138-196

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 142.

JAMES M. COBURN AND WILLIAM N. EWING, APPELLANTS,

*vs.*

THE CEDAR VALLEY LAND AND CATTLE COMPANY (LIMITED).

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED OCTOBER 4, 1887.

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*a* UNITED STATES OF AMERICA, *set:*

To the Cedar Valley Land and Cattle Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to an appeal from the decision of the circuit court of the United States for the western division of the western district of Missouri, in a cause wherein J. M. Coburn and W. N. Ewing are appellants and you are respondent, to show cause, if any there be, why the judgment rendered against the said appellants in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arnold Krekel, district judge of the United States for the western division of the western district of Missouri, this 2nd day of December, in the year of our Lord one thousand eight hundred and eighty-six.

A. KREKEL, *Judge.*

Service of the above accepted.

GEO. W. McCRARY,
*Solicitor for Appellee.*

[Endorsed:] 1072. Citation.

1 UNITED STATES OF AMERICA, *set:*

Pleas and proceedings had before the circuit court of the United States for the western division of the western district of Missouri in a cause wherein Wm. N. Ewing and James M. Coburn are complainants and The Cedar Valley Land and Cattle Company, Limited, is defendant.

In Chancery.

Be it remembered that heretofore, to wit, on the 8th day of December, A. D. 1885, the following proceedings were entered upon the order book of said court, to wit:

WM. N. EWING *et al.*
*against*
CEDAR VALLEY LAND & CATTLE CO.

This day come complainants, by their solicitors, Messrs. J. G. Waters and Karnes & Ess, and, by leave of court heretofore obtained, file cross-bill of complaint against defendants. Thereupon it is ordered that subpœna issue, returnable to January rules.

Said cross-bill of complaint is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri.

THE CEDAR VALLEY LAND & CATTLE COMPANY (Limited), Complainants,
*vs.*
WILLIAM N. EWING and JAMES M. COBURN, Defendants.

*Cross-Bill of Defendants.*

2 To the honorable judges of the circuit court of the United States in and for the western division of the western district of Missouri:

The defendants, William N. Ewing and James M. Coburn, by leave of court first obtained, bring this their cross-bill of complaint against the complainant, and, humbly complaining, say—

That the defendants have been for a long time past and now are copartners doing business under the firm name of Coburn & Ewing and transacting a general brokerage and commission business in the sale of property of every kind and description for a permanent occupation and livelihood, and had on their books and in their hands for sale, at and prior to all the times alleged in complainant's bill, the cattle ranch of W. B. Munson, located in the State of Texas, for sale and upon and for a reasonable commission to be paid by the said Munson.

That George Burnett, one of the persons alleged in complainant's bill as having been a promoter of and an original director in the complainant company, well knowing the business of defendants, and that they had said ranch for sale for a reasonable compensation, to be paid by said Munson, entered into a contract and agreement with these defendants, without disclosing any other person's connection with him and without disclosing to these defendants that he was acting in concert or association with any one else, that he would procure a purchaser for said ranch if defendants would share their commission with him, and which the defendant- agreed to do.

That afterwards these defendants were directed by the said Burnett to buy said ranch upon terms, conditions, and at a specified price for each item, then known to the said Burnett; that the
3 said Burnett was then in England, and these defendants, in pursuance of their agreement with him and acting in accordance with his directions, purchased said ranch and made and entered into all the agreements alleged in complainant's bill, and framed every provision in the same in accordance to his direction, the defendants at the time expecting to receive their pay for their services from said Munson.

That the defendants purchased said ranch for a price fully one hundred thousand dollars less than its actual or market value and expended a large period of time in accomplishing the same, and in all things pertaining to the same acted in direct accordance with the orders of said Burnett, with whom only they had to do, and they

were and are entitled to be paid for their services in the full sum of fifty thousand dollars, which they aver is a reasonable compensation for their services.

That at the time of rendering said services the complainant was not then created or in existence.

That after all of said contracts and writings alleged in complainant's bill had been executed the complainant became incorporated and came into existence, with the said George Burnett as a director thereof, and with him at all its sessions and in all things acting as part of its board of directors, and on or about January 7th, 1885, adopted and ratified said contracts and agreements and for the first time made them its own.

That afterwards, in March, 1885, the complainant desiring to have the defendants subscribe to its capital stock, entered into an agreement with defendants that if the defendants would subscribe $100,000 to its capital stock that it would appoint the defendant, W. N. Ewing, its manager for the period of five years, at a salary of £600 for the first year and for such sum, not less than $5,000, that the board of directors and said Ewing could agree upon;

3½ that the defendants, knowing and relying upon the peculiar fitness of said Ewing for that position and upon that one and only condition, took and subscribed for $100,000 of its capital stock, and paid in cash to the complainant the sum of $50,000 thereon, and the said Ewing was thereupon made and appointed its manager for the period aforesaid.

These defendants, by way of cross-bill, further say that the complainant, without reason and in violation of the rights of defendants under said contract of subscription, attempted to annul and bring to an end the contract of said Ewing as such manager, and without offering to cancel their subscription of stock, without offering to return any part of said money received by it from defendants as payment of said stock, and without offering or tendering to pay to said Ewing his reasonable and expected profit arising from said contract, and has attempted at its general office and home in England to sequestrate the stock of defendants, and has refused to permit its transfer on the books of complainant.

These defendants, by way of cross-bill, further charge the fact to be that the actual, intrinsic, and market value of said stock so owned by them is of the value of one hundred and twenty-five thousand dollars; that the reasonable and expected contract arising out of said contract of defendant Ewing with complainant is the full sum of twenty thousand dollars.

These defendants, by way of cross-bill, pray that the complainant may be required to answer specifically the averments of this cross-bill under its seal, and may be required to so answer specifically and in detail each and every of the following numbered interrogatories, it being the only means of obtaining the same in the power of defendants—that is to say:

Interrogatory No. 1. Give the names of each promoter of

4 complainant and the time at which he first associated in the enterprise.

Interrogatory No. 2. Set out in full the by-law or article of complainant in its articles of association that permits a director to make contracts or be interested in contracts without becoming liable to the complainant for his interest or profits therein.

Interrogatory No. 3. Was it ever at any time the expectation or agreement of the complainant that it was to or should pay any person a commission or compensation for the purchase of the Munson ranch; and, if so, to whom?

Interrogatory No. 4. Did not the complainant after it came into existence make a contract with Munson for the purchase of his ranch; and, if so, what was its date?

Interrogatory No. 5. State the names of each and every promoter of the complainant that upon its creation and organization did not become stockholder or officer.

Interrogatory No. 6. Attach to the answer the entire action taken by the board of directors in relation to the purchase of the Munson ranch, giving from the record of proceedings an exact transcript thereof.

Interrogatory No. 7. Attach to your answer every circular issued by the board of directors or any of its officers or by its authority relating to the Munson ranch, the price paid, or the bargain had in the purchase.

Interrogatory No. 8. Attach to your answer the entire correspondence in your possession between the defendants and complainant in relation to the subscription of stock by them or in the appointment of W. N. Ewing as manager.

Interrogatory No. 9. Attach to your answer a transcript or copy of the record of proceedings of the board of directors relating to the subscription of stock by defendants or the appointment of W. N. Ewing as manager.

Interrogatory No. 10. What sum or price was agreed to be paid defendants or either of them for their services in the purchase of the Munson ranch; to whom was it to be paid, and was it a specified amount or a reasonable compensation?

Interrogatory No. 11. Was Thomas Kingscote a promoter of complainant; and, if so, when did he first become one?

Interrogatory No. 12. Has Thomas Kingscote ever become a stockholder; and, if so, when?

Interrogatory No. 13. State when George Burnett, Duncan Stewart, George Campbell, and George D. Fisher each first became promoters and first became stockholders in complainant.

Interrogatory No. 14. Give transcript or copy of record of proceedings of the board of directors and date thereof annulling and canceling the contract of W. N. Ewing as manager.

Interrogatory No. 15. State whether the complainant has at any time offered or tendered any pay for the services performed in the purchase of said ranch to the defendants or either of them; and, if so, what was it?

Interrogatory No. 16. State what was the time Munson and the complainant first entered into the agreement for the sale and purchase of this ranch.

Interrogatory No. 17. State if at that time the price in detail and item by item was not then known and agreed upon between them; and, if not, what item or its price was not then known.

Interrogatory No. 18. How much money did complainant receive on the stock subscription from defendants?

Interrogatory No. 19. What action has the complainant taken to sequestrate or seize the defendants' stock or enforce a lien thereon or to prevent a transfer thereof? Give a transcript of the
6 record of same.

These *complainants* ask that upon the complainant having fully and specifically answered each of the foregoing interrogatories, and upon it appearing to the court that these defendants are entitled to be paid their reasonable compensation for the purchase of said ranch, and that it was the duty of the complainant to pay the same, that upon a final hearing of this action the complainant may be decreed to allow and pay the defendants or one of them, or to whomsoever of them is entitled thereto, a reasonable compensation for the purchase thereof; that upon a final hearing of this action the complainant may be required to pay to these defendants the sum of one hundred and twenty-five thousand dollars, the actual, intrinsic, and market value of their stock, less any sum that may be unpaid thereon; and that by the further decree of this court that the complainant may be required to pay to W. N. Ewing, defendant, the sum of twenty thousand dollars, his reasonable, expected, and contemplated profit, and all by reason of the wrongs of complainant, and arising, growing out of, and part of the matters and transactions alleged in complainant's bill, and for such other relief as may be proper in the premises, and for costs of suit; and these defendants, as in duty bound, will ever pray, &c.

KARNES & ESS &
WATERS AND CHASE,
*Solicitors for Defendants.*

J. V. C. KARNES, *Of Counsel.*

The following præcipe for subpœna was also filed on the 8th day of December, 1885:

7 In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri.

THE CEDAR VALLEY LAND & CATTLE COMPANY (Limited), Complainant,
*vs.*
WILLIAM N. EWING and JAMES M. COBURN, Defendants.

*Precipe.*

To the clerk of above court:

You will please issue subpœna in chancery against the complainant on the cross-bill filed by defendants, directed to the marshal,

and with directions that the same be served on Hon. George W. McCrary, one of complainant's solicitors, to be found within the jurisdiction of this court.

KARNES AND ESS,
WATERS AND CHASE,
*Solicitors for Defendants.*

And thereupon a subpœna in chancery was issued against said complainant and delivered to the marshal, and the same was afterwards, to wit, on the 21st day of December, 1885, returned into the clerk's office duly served; said subpœna in chancery and return thereon are in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
*Western Division of the Western District of Missouri,* } *sct:*

The President of the United States of America to the Cedar Valley Land & Cattle Company (Limited), Greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United
8 States for the western division of the western district of Missouri, on the first Monday of February next, at the city of Kansas, then and there to answer the bill of complaint of William N. Ewing and James M. Coburn, citizens of the State of Missouri, filed against you on the 8th day of December, A. D. 1886. Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 14th day of December, 1885.

[SEAL.] Issued at office, in the city of Kansas, under the seal of said court, the day and year last aforesaid.

H. C. GEISBERG,
*Clerk of said Circuit Court,*
By JOHN M. PARRY, *D. C.*

MEM.—The defendant to enter its appearance in this suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

H. C. GEISBERG, *Clerk,*
By JNO. M. PARRY, *D. C.*

UNITED STATES OF AMERICA,
*Western Division of the Western District of Missouri,* } *sct:*

I do hereby certify that I executed this writ by delivering a certified copy of the same to George W. McCrary, attorney for the Cedar Valley Land — Cattle Company (Limited), at Kansas City, Mo., Dec. 21st, 1885.

All done in the western division of the western district of Mo.

ELIJAH GATES,
*U. S. Marshal, Western District of Missouri,*
By C. C. COLT, *Deputy.*

9 Marshal's fee:

1 service ..... $2 00

Total ..... $2 00

On the 4th day of January, 1886, the Cedar Valley Land and Cattle Company, Limited, entered its appearance as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

COBURN & EWING
*vs.*
THE CEDAR VALLEY LAND & CATTLE CO., Limited. } Case No. 1072. Cross-Bill.

Now comes the Cedar Valley Land & Cattle Company, Limited, by its counsel, and enters its appearance to the cross-bill of Coburn & Ewing.

ADAMS & FIELD,
*Solicitors for said Company.*

Afterwards, to wit, on the 1st day of February, 1886, the following entry appears of record:

WM. N. EWING *et al.*
*against*
CEDAR VALLEY LAND & CATTLE CO.

Now comes defendant, by its solicitors, Messrs. Geo. W. McCrary and Adams & Field, and files demurrer to complainants' cross-bill herein.

In the United States Circuit Court for the Western Division of the Western District of the State of Missouri.

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited, Complainant,
*vs.*
10 WILLIAM N. EWING and JAMES M. COBURN, Defendants.

*The Demurrer of the Cedar Valley Land and Cattle Co., Limited, to the Cross-Bill of W. N. Ewing and James M. Coburn.*

The Cedar Valley Land and Cattle Co., by protestation, not confessing all or any of the matters and things in the alleged cross-bill of W. N. Ewing and James M. Coburn to be true in such form and manner as the same is therein set forth and alleged, doth demur to said cross-bill, and for cause of demurrer showeth:

I. That there is no person named or made defendants therein.

II. That there is no prayer for the issuance of subpœna or process therein.

III. That there is a lack of sufficient averments therein to confer jurisdiction upon this court.

IV. That the matters and things therein or the relief prayed for

therein are not in aid of any defense to the original suit of the Cedar Valley Land and Cattle Co., Limited, against said Ewing and Coburn.

V. That there is a want of equity in said cross-bill.

VI. That said cross-bill states nothing showing any equity in favor of said Coburn and Ewing against the Cedar Valley Land and Cattle Co., Limited.

Wherefore, and for divers other good causes of demurrer appearing in said cross-bill, the said Cedar Valley Land and Cattle Co., Limited, doth demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any other or further answer to said cross-bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

GEO. W. McCRARY,
ADAMS & FIELD,

11 *Solicitors for the Cedar Valley Land and Cattle Co., Limited.*

*Certificate of Counsel.*

We, counsel and solicitors for the Cedar Valley Land and Cattle Co., Limited, hereby certify that in our opinion the foregoing demurrer of said company is well founded in point of law.

ADAMS AND FIELD,
*Counsel for said Cattle Company.*

George D. Fisher on his oath states that he is a stockholder, director, and the attorney-in-fact of the Cedar Valley Land and Cattle Co., Limited, the person interposing in the foregoing demurrer, and that said demurrer is not interposed for delay.

GEORGE DIXON FISHER.

Subscribed and sworn to before me this 22d day of January, 1886.

[SEAL.] J. R. BINGHAM,
*Notary Public, Jackson County, Mo.*

12 On the 19th day of June, 1886, the following entry appears of record:

CEDAR VALLEY LAND & CATTLE CO. *et al.*
*against* } 1043 & 1070.
JAMES M. COBURN *et al.*

and

JAMES M. COBURN *et al.*
*against* } 1069 & 1072.
CEDAR VALLEY LAND & CATTLE CO. *et al.*

This day comes the Cedar Valley Land & Cattle Co., by its solicitors, and files petition for a decree, with affidavits in support thereof.

Said petition for decree is in the words and figures following:

In the Circuit Court of the United States within and for the Western District of Missouri, Western Division.

| | | |
|---|---|---|
| CEDAR VALLEY LAND & CATTLE CO., Limited, *v.* WILLIAM N. EWING *et al.* | 1043. | Bill. |
| J. M. COBURN *et al.* *v.* CEDAR VALLEY LAND AND CATTLE CO., Limited. | 1069. | Bill. |
| CEDAR VALLEY LAND & CATTLE CO., Limited, *v.* J. M. COBURN *et al.* | 1070. | Cross-Bill. |
| COBURN & EWING *v.* CEDAR VALLEY LAND & CATTLE CO., Limited. | 1072. | Cross-Bill. |

13 Now comes the Cedar Valley Land and Cattle Company, Limited, a party to all the above-mentioned suits, and petitions the court to enter an order or decree in each of said cases showing that the matters in controversy therein have all been settled and compromised by the parties and are decreed and adjudged to be finally settled, and ordering that all the said cases be dismissed, the plaintiff in each to pay costs therein, and that the sureties on the injunction bond given by this petitioner be discharged.

And in support of this application the petitioner files herewith true copies of the written correspondence between the parties, embodying their agreement of compromise, and on the hearing of this petition will produce the originals thereof; also affidavit of George Dixon Fisher.

THE CEDAR VALLEY LAND & CATTLE CO.,
By GEO. W. McCRARY &
ADAMS & FIELD, *Solicitors.*

Said correspondence is as follows:

Received November 12, 1885.

Karnes and Waters will recommend any one of the following compromises:

1. C. & E. to be paid back the money for their stock, say, $50,000.

C. & E. to pay back the sum of $40,000.

Ewing to resign the management.

The company to enter its appearance in a suit to be brought by C. & E. to determine value of their services and commission
14 in purchase of property, leaving out all transactions between C. & E. and W. B. M.

2. The company to allow C. & E. 25,000 as their commissions for the purchase of the ranch, C. & E. to pay balance of $40,000, company to pay back amount of stock, each party to pay costs made by themselves.

3. Arbitrate by three persons, one selected by each, they to choose a third, what their services shall be, and the company then to pay the amount set, C. & E. to pay $40,000 & company to pay amount of stock.

Either proposition to be finality as to all the matters embraced in the bill filed by the company *vs.* C. & E.

*Response to the Proposition of Waters & Karnes, Attorneys for Coburn & Ewing.*

Adams & Field and Geo. W. McCrary will recommend to their client, the Cedar Valley Land & Cattle Company, a settlement with Coburn & Ewing as follows:

1. C. & E. to be allowed for their stock what they have paid on it.

2. C. & E. to pay back to the company the sum of $40,000.

3. Ewing to surrender the management.

4. This settlement to be a full and final adjustment of all the controversies between the parties and of all claims of either party against the other.

5. No delay of legal proceedings in consequence of these negotiations, unless by an agreement the controversies are ended.

This proposition involves the surrender of the company's claim for the profit on the sale of the Delaware-street property, to which we think it entitled, and which will, we suppose, amount to about the sum of $15,000, as well as other claims set forth in its bill.

And it involves also the allowance for the stock of C. & E. of about $10,000 more than its present value.

These are therefore the most favorable terms we can recommend, and under no circumstances can we advise the payment of commissions to C. & E. or any waiver of the company's right to defend against any claim that they may make on this account.

KANSAS CITY, MO., *Dec.* 28, 1885.

Judge Geo. W. McCrary, att'y-at-law.

MY DEAR SIR: In the matter of the controversy between the Cedar Valley Land & Cattle Company and Mess. Coburn & Ewing, it must have been observed that I have not seemed quite in accord with those associated with me. I have always felt inclined to some amicable adjustment, and regretted when I was directed to terminate rather summarily the negotiations to that end undertaken a few weeks ago. I have now taken the liberty of addressing you this note entirely upon my own responsibility, and I am induced to do so by a statement made to me by Mr. Gage, a mutual friend of both parties, to the effect that he understood Mr. Fisher that the terms proposed by you in our former negotiation were still open for acceptance. If such be the case, I say frankly to you that in my judgment the terms then proposed contain substantially the correct basis of settlement, and I would like again to move in the direction of

ending all this interminable litigation. I do not wish to trespass on your valuable time, and hence I have not called to present these views in person, but if this letter receives a favorable response
16 I will see my clients and at some time when agreeable to you will call at your office to canvass the matter more in detail. If it is thought best by you not to negotiate further, I would be glad that no mention be made of this letter.

With high regard, very truly, J. V. C. KARNES.

KANSAS CITY, MO., *December* 28, 1885.

J. V. C. Karnes, Esq., Kansas City.

MY DEAR SIR: Yours of this date received. Mr. Fisher is out of town and will not return until the last of the week. I think, however, he is still disposed to settle, and if you can bring your clients to agree to the terms proposed by us, let me know, and as soon as he returns I will see him and advise you.

Yours truly, GEO. W. McCRARY.

P. S.—I will not mention the matter to any one until I hear from you further.

G. W. M.

KANSAS CITY, MO., *Dec.* 28, 1885.

Judge Geo. McCrary, city.

MY DEAR SIR: Upon the receipt of your communication of to-day I at once sought an interview with my clients. Maj. Ewing is out of the city, and I only saw Mr. Coburn, who thinks Maj. Ewing will agree to any arrangement that he may make. He has
17 much to say of the company's injustice to them in seeking to appropriate without compensation the result of their labor and skill in the purchase of this property. He contends that Munson was taken at a time when for several reasons he was very anxious to sell, and that they drove an unusually good bargain with him. Of course, I have sought to impress upon him that the case must be tried squarely upon the law. I have brought myself to believe that there is not much probability of your recovering on account of the house and the bulls, but as to the commission of $40,000 I have said frankly that I believed the chances were against my clients. This amount represents the whole sum your company has lost, while it has received the benefit of valuable services at no expense whatever. Any settlement made must involve an entire withdrawal of the interests of Coburn & Ewing. They insist that their stock is worth a premium, while, on the other hand, Mr. Fisher claims that it has depreciated. I am aware that you have the impression that Burnett was not connected with this sale, but in this it is more than probable that you are in error, and Coburn & Ewing have in their possession the proportional part realized coming to Burnett, amounting to $16,800. All these phases of the case I have gone over carefully with Mr. Coburn, and he has become willing to settle in a way approximately as follows:

(1.) That the stock of Coburn & Ewing be taken at $50,000.

(2.) That Coburn & Ewing pay back to the company the $40,000 received from Munson.

(3.) That the company, with American securities, indemnify C. & E. against any claim of the representatives of Burnett as to the $16,800.

(4.) That all suits be dismissed, each party paying his own
18 costs, all claims for damages or compensation be waived, and full receipts passed.

(5.) That the salary of Ewing up to the time of his discharge be paid to him, amounting to about one month's pay, and that there be paid a few small items of expenses, amounting in all to a very small sum. As I understand, this is substantially your proposition to us. In a conversation with you I think you stated that you would favor the indemnity for the $16,800. I believe there is a controversy between Mr. Ewing and Mr. Fisher as to whether the company owes Ewing about a month's balance on salary. This, however, of course, can be settled by the books. If I have not made my proposition clear I will be glad to state it more fully, and upon Mr. Fisher's return I much hope a satisfactory adjustment can be made.

Yours truly, J. V. C. KARNES.

KANSAS CITY, MO., *January* 5, 1886.

Col. J. V. C. Karnes, Kansas City.

MY DEAR SIR: We were advised by the counsel of the Cedar Valley Land & Cattle Company in London that the company has no right either to purchase or provide for the cancellation of the stock now held by Coburn & Ewing. In view of this advice, Mr. Fisher does not feel at liberty to conclude the settlement upon the basis of taking back the stock. If we could agree upon any settlement which would leave the stock in the hands of Coburn & Ewing or which would not require the company to take it, Mr. Fisher would feel at liberty to act in the matter; but as I assume that this
19 cannot be accomplished, I have advised Mr. Fisher, who leaves for London in a few days, to lay the whole matter before the board and give us instructions which will, I hope, enable us to agree with you upon some disposition of the stock and upon a final satisfactory adjustment of the matters between the parties.

Yours truly, GEO. W. McCRARY.

KANSAS CITY, MO., *January* 8, 1886.

Judge Geo. W. McCrary, att'y-at-law.

DEAR SIR: Your note of the 5th inst. was duly received, stating that no further action could be taken in the matter of settling the dispute between the C. V. L. & C. Co. and Mess. Coburn & Ewing until Mr. Fisher had additional instructions from his company. I have delayed answering until I could confer with Mess. C. & E., which I have now done. They greatly regret the delay that will be necessar-y occasioned, as they hoped for a speedy termination of the controversy. I have urged upon them that they allow me to con-

tinue my efforts for an adjustment. This they have done, with the understanding that I request you to ask Mr. Fisher to report by cable at the earliest possible moment whether the proposition will be accepted. This is a matter involving so large an amount and requiring the taking of testimony at so many and such remote points that I assume that we are agreed as to the importance of determining this negotiation one way or another as soon as the same can be reasonably done.

20 Awaiting your further advice, I am, very truly,

J. V. C. KARNES.

KANSAS CITY, MO., *January 11th*, 1886.

J. V. C. Karnes, Esq.

DEAR SIR: I have arranged with Mr. Fisher to cable me instructions from London as to compromise of the controversy between Coburn & Ewing and the C. V. L. & C. Company. I will advise you promptly when instructions are received.

Very truly yours, GEO. W. McCRARY.

KANSAS CITY, MO., *Jan'y* 26, 1886.

Judge Geo. McCrary, city.

DEAR SIR: Mess. Coburn & Ewing have 2,000 shares in the C. V. L. & C. Co., £5 each, paid, amounting to about $48,800. They will settle the controversy with the company—

1. By returning the $40,000 commission and the company's taking their stock at the actual price paid by them, or,

2. They will turn over to the company 1,600 shares and retain 400.

3. In any event C. & E. are to be protected against any claim by Burnett's estate either by a release or indemnity.

4. Mess. C. & E. agree not to buy up or otherwise molest any of the ranch privileges now enjoyed by the company.

5. This settlement in no way to affect the arrangements heretofore made concerning the W. & L. cattle, but the same to be carried out by both parties in good faith as agreed upon, but not to enter into this arrangement in any way whatever. In other words, the

21 W. & L. cattle are in no way taken into consideration in this settlement.

6. The balance of salary as compensation to be paid to Mr. Ewing.

Very truly, KARNES & ESS.

KANSAS CITY, MO., *February* 2, '86.

Col. J. V. C. Karnes, Kansas City.

MY DEAR SIR: I enclose herewith a letter just received from Mr. Fisher from New York, which explains itself. Mr. F. carries with him to London the several propositions of settlement which have been under discussion. Will you kindly advise me what response Coburn & Ewing have to make to the terms suggested in this letter?

If possible I should like to be advised in time to write to Mr. Fisher to-morrow, as requested.

Please return Mr. Fisher's letter.

(Inclosure.)

Yours very truly. GEO. W. McCRARY.

NEW YORK, 29*th Jan'y*, 1886.

Geo. W. McCrary.

MY DEAR SIR: As I wired you yesterday I am unfortunately here till to-morrow, at 2 p. m., in consequence of the steamer I intended sailing with yesterday being disabled. I am sorry at this, as I am anxious to get to London to consult with my codirectors. I have been thinking a good deal over the best way to arrange a compromise with C. & E., but, in every shape I take it, it is always saddled with the difficulty of dealing with their stock.

22 No one, of course, would be fool enough to take their shares at par, when it is so generally known, and by none better than C. & E. themselves, that the value of all cattle shares are not within 20 per cent. of what they were, and as the company itself can neither buy or cancel it is most perplexing. The following is a proposition that has occurred to me that C. & E. might submit to the board: C. & E. agree to pay Co. the $5,000 commission, with interest thereon at the rate of 8 per cent. per annum for the time they have had it; C. & E. to retain their stock in company, the directors getting for them an advance on it for $40,000, at the rate of interest of 10 per cent. per annum, said advance to go to liquidate the debt to the company, C. & E., besides, paying the company's expense in connection with this litigation.

This arrangement would enable C. & E. to hold their stock, which they appear to value so highly, until such time as they could sell it at par, or possibly, in two years, at a premium, and at the same time refund the $40,000. The company would in this case not commence proceedings for damages caused by turning back the cattle. If you think well of this project you can see Karnes about it, and if C. & E. are disposed to make the above proposition, cable the word "consent" on 8th February, the day I expect to get to London. Frankly, I must say this is a more favorable settlement than I would give them, as I am satisfied there is more in the real estate than $15,000, but under the circumstances might be accepted by the board.

Faithfully, GEO. D. FISHER.

Of course, if there is no cablegram, I will understand they will not make this proposition; in any case, write not later than

23 Wednesday.

KANSAS CITY, MO., *Feb'y* 2, 1886.

*Mess.* Geo. W. McCrary, city.

DEAR SIR: I am just in receipt of your letter of to-day, including a letter from Mr. Fisher, from N. Y., which I herewith return to you. You have heretofore seen fit to express your appreciation of what I had done and was doing to get this controversy settled, and

hence I need not restate my endeavors in the matter. I am only sorry to see Mr. Fisher taking the position indicated by his letter. I am now convinced that Mr. Gage was correct in his opinion that he, F., was unfavorable to any settlement. The terms proposed in his letter I have not submitted nor will I submit to my clients. I have been satisfied from the beginning and am still satisfied, and have so stated to Mess. C. & E., that they were liable in law for the return of the $40,000, but I do not believe they are liable any further. This they ought to repay. On the other hand, this company has received the benefits of their labor without any expense. There ought to be some recognition of the equities of the case. On such a basis I have tried to have an adjustment made; but if it is the determination of Mr. Fisher to drive these men to the wall, then there is no alternative left but to fight. I shall still hope, however, that through the co-operation of yourself and Mr. Gage that a fair and just settlement may be made, and that the damage to the interests of all concerned, to which Mr. Fisher's rashness will lead, may be avoided. As Mr. Fisher mentioned my name in his letter, I would be glad to have him furnished a copy of this.

24 Very truly, J. V. C. KARNES.

*Cablegram.*

From London. Kansas City.

Ewing's proposals declined. Letter posted to-day, enclosing complete answer to cross-bill and conveying the only terms which will be accepted. Inform Ewing.

KANSAS CITY, MO., *February* 24, 1886.

Col. J. V. C. Karnes.

MY DEAR SIR: I enclose a copy of letter, just received from the secretary of the Cedar Valley Land & Cattle Company, submitting the only terms upon which the company will settle with Coburn & Ewing. The sum demanded is nominally larger than that offered by you, but, as it is proposed to receive payment in cattle and the stock of the company now held by C. & E. at par, I am in hopes your clients will consider it better to accept than to continue the litigation.

If this proposition is accepted please advise me before March 4th.

Yours truly, GEO. W. McCRARY.

KANSAS CITY, MO., *Feb.* 27, 1886.

Judge Geo. W. McCrary, city.

25 DEAR SIR: On February 4th, 1886, you handed to J. V. C. Karnes, Esq., one of our counsel, a copy of a letter which you had just received from the secretary of the Cedar Valley Land & Cattle Company, which is as follows:

"THE CEDAR VALLEY LAND & CATTLE COMPANY, LIMITED,
MORGATE STREET CHAMBERS, LONDON, E. C., *Feb.* 11, 1886.

DEAR SIR: The board have had under their very careful consideration Mess. Karnes & Ess' letter, dated the 26th of January, 1886, containing two alternative offers by Mess. Coburn & Ewing for the settlement of the claims made by the Cedar Valley Land & Cattle Company upon them.

I am instructed to inform you that neither of these propositions is acceptable, and that the action against Mess. Coburn & Ewing must proceed. With that view the answer to Mess. Coburn & Ewing's cross-bill has been forwarded to Mess. Adams and Field along with a letter from the solicitors to the company.

The company being liable in a large sum of costs, which will not be recovered from Mess. Coburn & Ewing, the only terms upon which the board can agree to compromise the claim of the company are as follows:

1. That the amount payable to the company by Mess. Coburn & Ewing be £10,000, the amount paid by them for the 2,000 shares now standing in their names.

2. That this amount, £4,000, shall be paid in cash, or in lieu thereof that the cattle of the L. & W. herd now upon the Cedar Valley ranch shall be accepted as cash, when counted over this spring, upon a valuation to be made by two valuers—one chosen by Coburn & Ewing and one by the company—the valuers appointing
26 a referee.

3. That the balance then remaining due to the company will be discharged by the transfer to such person or persons as may be named by the board of a sufficient number of Mess. Coburn & Ewing's shares on the basis of a par value, the shares then remaining in the hands of Coburn & Ewing to be held by them for a period of not less than two years.

4. Mess. Coburn & Ewing to give security that they will not buy up or otherwise molest any of the range privileges now enjoyed by the company.

5. The company agree to protect Coburn & Ewing against any claim from the executors or the partner of the late Geo. Burnett.

When the board consider (1) that the issue has practically been decided against Mess. Coburn & Ewing by the same judge before whom the case will ultimately be tried; (2) that Mess. Coburn & Ewing have received from Mr. Munson the sum of $75,000 for a property which, in the written estimate of six of the eminent valuers in Kansas City, is worth from $45,000 to $50,000; (3) the almost insuperable difficulty which the board will have in placing any of the shares transferred by Mess. Coburn & Ewing in consequence of the non-payment, a dividend resulting from Mr. Ewing's vindicative or ill-judged action in ordering the beeves back to the ranch, and (4) the interest upon the amount of commission obtained in various ways from Mr. Munson from the period of its receipt up to the present date, which, we are advised, would be recoverable from them by an action at law, the board is of the opinion that the foregoing

offer is more favorable to Mess. Coburn & Ewing than the latter have any right to expect. The board, however, is induced to offer these easier terms with the object of settling the matter before the general meeting of the 4th of March. It is therefore to be
27 distinctly understood that this proposal only remains open until the 3rd of March, and that failing the receipt on or before that date of a telegram announcing that Mess. Coburn & Ewing have signed an agreement embodying the above terms, the offer now made by the board is withdrawn on that day. It will suit the company infinitely better to receive the amount of their claim in cash, as would be the case when a judgment has been recovered in their favor, than to have to deal with any large number of shares transferred by Mess. Coburn & Ewing. It is to be understood that the offer is to be made without prejudice to any claim for damages which the board may have against the executors or the partner of the late George Burnett.

The directors desire me to add that in the event of the foregoing offer being refused they will feel it their duty in the interests of the shareholders to claim full compensation for damages which the company have sustained under various heads, which are clearly attributable to the account of Mess. Coburn & Ewing.

I am, dear sir, yours truly,

JAMES E. WEBB, *Sec'y.*

Geo. W. McCrary, Kansas City, Mo., U. S. A."

And on February 26th, 1886, you sent to Mr. Karnes the original letter you had on that day received from the same party, and which was as follows:

28 THE CEDAR VALLEY LAND & CATTLE COMPANY, LIMITED, MORGATE STREET CHAMBERS, LONDON, E. C., *12th Feb.*, 1886.

DEAR SIR: In reading over the letter which I had the pleasure to address to you yesterday I noticed two points in reference to which I would like to make some observations.

The sum of £10,000 is fixed as the damages to be paid by Mess. Coburn & Ewing, and it is added that this sum was the amount paid by Mess. Coburn & Ewing for their shares. Seeing that there is no connection whatever between the claim for damages and the payment for shares, it is advisable that the words "the amount paid by them for the 2,000 shares now standing in their names" be eliminated from the letter, if you think advisable to read it or give a copy of it to Mess. Coburn & Ewing.

The words "vindicative or il-judged," on page 3 of the letter, should also be eliminated, as Mr. Ewing, in his letter — 24th October last, stating that he was acting for the best interests of the stockholders in turning back the beeves. These words are unnecessary, although the directors could not possibly approve a step which precluded the possibility of paying a dividend, the non-payment of which would have, as had been fully explained to Mr. Ewing, such an in-

jurious effect on an English company. If Mess. Coburn & Ewing should prefer to deliver the cattle of the L. & W. herd, now on the Cedar Valley ranch, the transfer of 12,00– would be accepted by the board at present, leaving the balance of £4,000 to stand over in the meantime. If the valuation of the L. W. herd shall eventually fall short of that sum, the balance of such valuation to be made up to the company by the transfer of an equivalent number of
29 shares in the company on the basis of a par value, the boarding of the above cattle to be paid for at the time of transfer at the agreed-on rate, $1.50 cents per head.

The board is quite ready to agree to Mr. Ewing's stipulation that he shall be paid his salary during such time as he remained in the service of the company, whatever amount may be found due to him upon a proper adjustment of accounts.

Will you kindly bear these points in mind in dealing with the other side.

I am, dear sir, yours truly,

JAMES E. WEBB, *Sec'y.*

Geo. W. McCrary, Esq., Kansas City, Mo., U. S. A.

Both of these communications, together with your two letters forwarding them to Mr. Karnes, he has placed in our hands. In connection with both our counsel we have fully considered the terms of this proposition. We wish to state emphatically that we regard the proposition as unjust and oppressive, but we have so much involved in this litigation that we agree to and accept the terms of the offer as made. The £4,000 will be arranged for with the L. W. cattle, as suggested in the letter of February 12th, and the 1,200 shares of stock therein mentioned we herewith hand you, to be transferred to such parties as may be named. We have only two certificates of two thousand shares each, and we deliver both to you, and the company can return us a certificate for 800 shares. The bond called for by the fourth section of the proposition in the letter of February 11th we will give at any time. It will
30 now soon be the season when the L. W. cattle can be counted, and we will be ready at once to name valuers. Now that a settlement has been effected, we hope there will be no delay in carrying it out in all respects as agreed upon.

We desire to express to you our thanks for the uniform courtesy with which you have treated us throughout this unpleasant matter.

We are, dear sir, very truly,

W. N EWING.
JAMES M. COBURN.
COBURN & EWING.

KANSAS CITY, *February* 27, 1886.

Mess. Coburn & Ewing, Kansas City.

GENTLEMEN: Mr. Karnes has handed me your letter accepting the terms of compromise proposed by the Cedar Valley Land & Cattle Company, and has also placed in my hands the certificates

for the two thousand shares of stock held by you in the company. I will wire Mr. Webb, secretary of the company, that you have accepted in writing the company's proposition, and have written him requesting that the company take immediate steps to choose a valuer and proceed with as little delay as possible to close up the matter of the compromise. Of course, it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties. The matter of costs and the balance due you on salary can easily be adjusted hereafter. Col. Karnes and I agree that each party pays its own costs.

Yours truly, GEO. W. McCRARY.

31 KANSAS CITY, MO., *March* 18, 1886.

Messrs. Karnes & Ess, Kansas City, Mo.

GENTLEMEN: I am just in receipt of a letter from James E. Webb, secretary of the Cedar Valley Land & Cattle Company, Limited, of date March 6th, of which I enclose you a copy. Mr. Webb sends me with this letter an assignment, to be executed by Messrs. Coburn & Ewing, transferring to him 1,200 shares of their stock in said company. When Mr. Webb wrote this letter he had not received my communication, written on the 27th day of February, informing him that Messrs. Coburn & Ewing had placed in my hands their certificates for the whole 2,000 shares, and had requested that the company would issue to them a new certificate for 800 shares. That letter would reach London about the 7th inst., and an answer may be expected very soon. Probably it would be better to take no further action until it is received.

Yours very truly, GEO. W. McCRARY.

The Cedar Valley Land and Cattle Company, Limited, Morgate Street Chambers (30*a* Morgate street).

LONDON, E. C., 6 *March*, 1886.

DEAR SIR: I have to acknowledge the receipt, on the 27th February, of your cablegram of that date, reading:

"Terms proposed accepted by Coburn & Ewing to-day in writing."

That telegram was laid before the board at their meeting on the 5rd inst., and I am directed to inform you that they are glad
32 that a settlement has been arrived at upon terms which they believe will be found upon consideration to be satisfactory to all parties. The board is prepared to find that all the obligations entered into by Mess. Coburn & Ewing will be faithfully and honorably carried out by these gentlemen, and they trust that amicable relations will be resumed and will continue uninterruptedly for the future.

With the view to carrying out the provisions of the agreement with Mess. Coburn & Ewing, I now enclose a transfer of 1,200 shares, to be executed in my favor, and the company undertake that if the value of the L. W. herd shall exceed the sum of £4,000 the differ-

ence shall be adjusted by the retransfer to Mess. Coburn & Ewing of shares to an equivalent value.

Awaiting confirmation by letter of your cablegram of the 27th,

Yours truly, THOMAS E. WEBB, *Sec'y.*

Geo. W. McCrary, Esq., K. C., Mo., U. S. A.

KANSAS CITY, Mo., *March* 27, 1886.

J. V. C. Karnes, Esq., Kansas City.

DEAR SIR: I am now advised that the Cedar Valley Land & Cattle Company cannot issue the new certificates for eight hundred shares of stock to Coburn & Ewing, as per terms of compromise, until the latter have assigned the twelve hundred shares. They therefore wish Mess C. & E. to execute the inclosed assignment, to be sent by me to London. This done, they will immediately execute and send over the new certificates for eight hundred
33 shares.

Please have the assignment executed and return to me at the earliest time practicable, as I wish to forward it without delay.

Yours truly, GEO. W. McCRARY.

(Inclosure.)

The affidavit of George Dixon Fisher is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, }
*Western District of Missouri, Western Division,* } *ss*:

GEORGE DIXON FISHER, being duly sworn, on oath deposes and says that he is the agent and attorney-in-fact of the Cedar Valley Land and Cattle Company, Limited, and as such has for some time been engaged in negotiations for the settlement and compromise of the pending litigation between that company and Messrs. Coburn & Ewing in the circuit court of the United States, in the above-mentioned district, and that on or about the 29th day of April, 1886, this affiant called upon J. M. Coburn, a member of the firm of Coburn & Ewing, and submitted to him the form of a bond to be given by said Coburn & Ewing in pursuance of the terms of compromise, to bind said firm not to buy up or otherwise molest any of the range privileges of said company. The form of bond had been drawn by George W. McCrary and printed with a typewriter, but as drawn was not satisfactory, and a change therein had been made in pencil by said McCrary by striking out the words "as part and parcel of the," in the second line, and inserting in place thereof
34 "in accordance with the terms of our letter of date February 27th, 1886, accepting terms of compromise." In this form the paper was handed to Mr. Coburn, who added the following words, which now appear upon the paper in his own handwriting: "Of all pending litigation." The first sentence of said bond was therefore amended by Mr. Coburn so as to read as follows: "That for a good and valuable consideration and in accordance with the terms of our letter of date February 27th, 1886, accepting terms of

compromise of all pending litigation between us and the Cedar Valley Land and Cattle Company, Limited," &c. The original paper submitted to Mr. Coburn, with the amendment thereto in his own handwriting, is herewith filed, marked "Exhibit A," and made part of this affidavit.

Affiant further states that he is a member of the board of directors of the Cedar Valley Land and Cattle Company, and was present in said board when the proposition of compromise which has since been accepted by Coburn & Ewing was discussed and agreed upon, and the secretary ordered to put the same in form; and affiant further declares that it was understood and intended by said board and by all the members thereof that the same should be a full and final settlement of all pending litigation between the parties.

Further affiant saith not.

GEORGE DIXON FISHER.

Subscribed and sworn to before me by George Dixon Fisher this 19th day of June, 1886. My commission expires April 24th, 1890.

[SEAL.] FRED. P. BARNETT,
*Notary Public, Jackson Co., Mo.*

35 "EXHIBIT A."

Know all men by these presents that for a good and valuable consideration and *as part and parcel of the* * [in accordance with the terms of our letter of date Feb'y 27th, 1886, accepting terms of compromise (of all pending litigation)] compromise between us and the Cedar Valley Land and Cattle Company, Limited, we, the undersigned, James M. Coburn and William N. Ewing, partners composing the firm of Coburn & Ewing, do hereby agree and bind ourselves not to buy up or otherwise molest any of the range privileges now enjoyed by the said Cedar Valley Land and Cattle Company, Limited, in the counties of Randall and Deaf Smith, in the State of Texas.

In witness whereof we hereunto set our names this 26th day of April, 1886.

____ ____.
____ ____.
____ ____.

(CLERK'S MEMO.—The portion of the above-copied paper-writing included in brackets is interlined in pencil in the original on file in my office, and that portion of the copy through which a line is passed is similarly lined in the original.)

36 The following is the affidavit of J. V. C. Karnes filed on the 22nd day of June, A. D. 1886.

*A line is drawn through the words printed in *italics*.

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

| | |
|---|---|
| COBURN *et al.*<br>*vs.*<br>CEDAR VALLEY LAND & CATTLE COMPANY, Limited. | Bill and Cross-Bill. |
| CEDAR VALLEY LAND & CATTLE COMPANY, Limited,<br>*vs.*<br>COBURN *et al.* | Bill and Cross-bill. |

J. V. C. KARNES, being duly sworn, upon his oath says that he was one of the solicitors for Coburn & Ewing in the above causes, and that the Cedar Valley Land & Cattle Company was represented by Hon. George W. McCrary and Mess. Adams & Field; and he says that after the correspondence of February 27th, 1886, R. H. Field brought to this office a statement, prepared by Judge McCrary, to the effect that the settlement as agreed on of that date was to be in full of all claims or demand between the respective parties in such litigation. Affiant says that he has not a copy of the paper produced by Mr. Field, but states the contents of it from recollection. He says that he then distinctly told Mr. Field that such paper would not be signed, but that his clients, Mess. Coburn & Ewing, had settled their matters with the Cedar Valley Land & Cattle Company on the propositions of February 11th and 12th, 1886, and the unconditional acceptance of these propositions that day given by said Coburn & Ewing; and that under no circumstances would this settlement be supplemented
37 by any further agreement. Affiant says that he was present with Mess. Coburn & Ewing and Jos. G. Waters, Esq., one of their solicitors, when these letters of February 11th and 12th were considered, and it was then understood and agreed that the propositions hitherto made had been rejected, and that the company offered these terms in these letters of February 11th and 12th as the ultimatum, and while it was desirable in many respects to modify these harsh terms, it was agreed that to avoid any misundertaking that the two letters be copied into a letter of acceptance, and that the terms be unconditionally accepted, and this was done; and affiant says that it was then distinctly stated by both Coburn and Ewing that these terms would be accepted only just in the way they were proposed and to cover nothing more; and affiant says that he and his associate counsel, Jos. G. Waters, prepared the letter of acceptance with that understanding. Affiant further says that in every letter and paper that has since been prepared that, so far as his knowledge extends, it has uniformly been with the understanding that the settlement of February 27th spoke for itself in the unconditional acceptance of the letters of February 11th and 12th, and that nothing was to be added thereto or subtracted therefrom.

J. V. C. KARNES.

Subscribed and sworn to before me, in Kansas City, Jackson county, Missouri, on this 22nd day of June, 1886. My commission will expire on the 22nd day of August, 1888.

[SEAL.] HENRY M. STONESTREET,
*Notary Public, Jackson Co., Mo.*

38 Afterwards, to wit, on the 19th day of July, 1886, the following entry appears of record, to wit:

WILLIAM N. EWING *et al.*
*against*
CEDAR VALLEY LAND & CATTLE CO.

This day a decree is ordered for defendant herein.

Said order for a decree is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

| | |
|---|---|
| COBURN *et al.*<br>*vs.*<br>THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited. | Bill and Cross-Bill. |
| CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,<br>*vs.*<br>COBURN *et al.* | Bill and Cross-Bill. |

There have been two actions pending between these parties, in each of which both bill and cross-bill were filed. While thus pending, negotiations for settlement were entered into, which have resulted in a settlement, and the question now presented is the extent of that settlement.

After several propositions had been made by both parties, on the 27th of February the cattle company sent to Coburn and Ewing a letter, in which all propositions of theirs were declined and in which it was stated that "the only terms upon which the board can agree to compromise the claim of the company are as follows." This proposition was unconditionally accepted and its terms have been
39 complied with by Coburn and Ewing. Now they insist that all that was settled was the claim of the company as presented in its pleadings, while their claims remain open and undisposed of. The company, on the other hand, insists that all the matters in controversy, including all the claims of both parties presented in these two actions, were included in the settlement and are disposed of by the same.

I think that the company is right, and for these reasons:

First. Wherever parties are in litigation, having antagonistic claims, and a settlement is proposed and accepted it will be presumed that all matters in controversy in that litigation are included within the settlement unless the contrary clearly appears.

Second. It is perfectly obvious that the cattle company intended by its proposition to cover all the claims in controversy. It is true in the letter it says "the claim of the company," and in a narrow and technical sense that undoubtedly means simply its cause of action and would not embrace any distinct cause of action in behalf of the adverse party; but it is not a strained or unnatural use of language to construe it as applicable to the amount which the company claimed as the balance due after the adjustment and settlement of the respective claims of both parties. That such was the intent of the company is obvious from a preceding paragraph of that letter, in which the company uses this language: "The board have had under their very careful consideration Mess. Karnes & Ess' letter, dated the 26th of January, 1886, containing two alternative offers by Mess. Coburn & Ewing for the settlement of the claims made by the Cedar Valley Land and Cattle Company upon them." In this is seen it speaks of offers made for settlement of the claims of the company—claims made by the company upon Coburn and Ewing. Turning to the letter referred to, we find that it was
40 in terms a proposition for settlement of the entire controversy and including the claims of both parties. Thus, in its letter proposing this settlement, the company placed an unmistakable interpretation upon the expression "claim of the company."

Further, immediately upon the receipt of the letter accepting this proposition counsel for the company wrote a letter, which was received by Coburn and Ewing, in which he stated: "Of course, it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties;" so not only is the intent of the company clear, but it is also clear that Coburn and Ewing had full notice of that intent. Now, a contract—and this settlement is nothing but a contract—implies the agreement of two minds as to certain matters. What the company intended is clear, and that Coburn and Ewing had knowledge of that intent is equally clear. Of course, if they proceeded with the settlement with notice of what the company meant by the terms used they accepted the contract upon that basis.

Further, on the 29th of April, after the acceptance of this proposition of settlement, a bond was presented to Mr. Coburn which contained this language: "In accordance with our letter of date February 27th, 1886, accepting terms of compromise between us." Not satisfied with this language, Mr. Coburn in his own handwriting interlined these words after the word compromise, "of all pending litigation," which clearly shows that he understood that the settlement covered all the claims in controversy.

Finally and chiefly, these actions were pending in a court of equity, and such a court will see that good faith and fair dealing are observed by both parties. After this proposition had been made and accepted and before anything had been done
41 except handing to counsel some certificates of stock, Coburn and Ewing were clearly notified of what the company intended by this proposition. Much remained to be done cattle were to be valued, counted, and delivered. It was an easy thing to hand

back the certificates of stock. If they were unwilling to accept the settlement when informed of what the company understood and intended by the proposition, it was their duty to say: We have misunderstood the scope of your proposition. If you mean all that you now say, we did not accept it. We have never come to any agreement. Instead of that, after full notice they go on and comply with all the terms of the proposition. It is too late for them now to say: We did not suppose that the proposition meant all that the company now claims. We thought it meant only a settlement of half the case, and insist upon the right to prosecute the other half.

I think the parties are entitled to a decree reciting that, upon the evidence presented, the court finds that there has been a full settlement of all the matters in controversy, and ordering that the several bills and cross-bills be dismissed, each party paying his own costs.

At the said May term, 1886, and on the 2nd day of August, 1886, the following entry appears of record, to wit:

WILLIAM N. EWING *et al.*
*against*
CEDAR VALLEY LAND & CATTLE CO.

The following decree, filed July 24th last, was this day ordered to be recorded, to wit:

In the Circuit Court of the United States, Western District of Missouri, Western Division.

WILLIAM N. EWING and JAMES M. COBURN
*v.*
THE CEDAR VALLEY LAND & CATTLE COMPANY, Limited.

1072.
On Cross-Bill.

42 This case came on to be heard upon the petition of the said respondent for final decree settling and adjudicating all the issues herein, George W. McCrary and Adams and Field appearing for respondent and J. V. C. Karnes and Joseph G. Waters appearing for complainants; and the court, having heard the evidence and the argument of counsel, sustains the said petition, and it is therefore ordered, adjudged, and decreed that there has been, by agreement of the parties, a full compromise and settlement of all the matters in controversy in this case; and it is ordered, in pursuance of the agreement of the parties, that the cross-bill be dismissed at the cost of complainants therein, to be taxed.

DAVID J. BREWER,
*Circuit Judge.*

And now come the complainants, by their solicitors, and file application for a rehearing and a stipulation of parties setting the time for hearing the same.

Said application for a rehearing is in words and figures as follows:

In the Circuit Court of the United States, Western Division of the Western District of Missouri.

JAMES M. COBURN *et al.*
*vs.*
THE CEDAR VALLEY LAND & CATTLE CO., Limited.

James M. Coburn and William N. Ewing ask the court to set aside and vacate the decree entered in the above-entitled cause and grant them a rehearing for the following reasons:

1. The evidence on which this decree was based consists entirely of correspondence between counsel and affidavits, and it nowhere appears that any form of entry was ever agreed upon or ever
43 spoken of, other than that the bills and cross-bills should be dismissed, each party paying his own costs. The settlement made was wholly outside of the court and was not pleaded, and the court has no jurisdiction to supplement the agreement of the parties by decreeing a final settlement.

2. The court overlooked the testimony showing that the counsel for the Cedar Valley Land and Cattle Company, before writing the letter to Coburn & Ewing, in which he stated "of course it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties," had written a paper embodying the same idea, and had submitted the same to the counsel for Coburn & Ewing, who had peremptorily refused to sign it, and the counsel for the company, knowing this refusal, did not offer to return the stock and terminate the arrangement, but held the stock, and in a letter to Coburn & Ewing assumed a state of facts to exist which he ought to have known did not exist. In overlooking this previous correspondence the court committed error.

3. The court further erred in reaching the conclusion that the details of the settlement were carried out by Coburn & Ewing without disclosing their understanding that this was not intended as a full settlement. The evidence will show that at every step the counsel for the company had full knowledge that this claim would be made, and every word was excluded from the receipts and other papers passed between the parties which could in any way be construed into a final settlement of all matters in dispute. These receipts and other papers were not in evidence, but it has been assumed that the company completed the arrangement on the belief that it was in full. We would ask to furnish copies of such papers and full affidavits covering these points.

4. The court erred in concluding that there was a lack of "good faith and fair dealing" on the part of Coburn & Ewing in
44 making said settlement. A proposition was made by the company and accepted by Coburn & Ewing. In less than an hour afterward a paper was prepared by counsel for the company engrafting upon the settlement as made additional terms, reciting that this was in full of all matters in dispute. This was promptly declined by counsel for Coburn & Ewing. The stock could have

then been returned, but it was retained, and an effort made again to have Coburn & Ewing committed to a full settlement by the letter which was written. In the progress of the settlement the forms for receipts were carefully prepared, so as to exclude the idea that it was a full settlement. The full evidence will disclose the fact that this company has carefully sought from the beginning to recover the last cent possible from Coburn & Ewing, and at the same time has been unwilling to have the claim made by Coburn & Ewing judicially determined. To refute this imputation of unfair dealing your petitioners would ask that they be permitted to offer in evidence the papers as originally prepared for carrying out the details of the settlement and the changes in them insisted upon by Coburn & Ewing and allowed by said company, showing that at all times from the acceptance of the proposition the company had full knowledge of the understanding of Coburn & Ewing and what they would insist upon, and that "good faith and fair dealing" would have required the company to have then repudiated the arrangement, instead of taking to itself all the benefits arising therefrom.

5. Full and complete evidence will show that the interlineation made by J. M. Coburn in bond has been wholly misunderstood. This bond was never used, and this change was made at a time when it was sought to agree upon these forms for carrying out the details, and in using this expression, "pending litigation," reference was had solely to claim made by the company, and when subsequently understood that it might be construed to cover both bills and cross-bills this expression was not used and nowhere appears in the papers so used in settlement; all of which can be shown by a full statement of all the evidence bearing upon this point.

6. The evidence discloses that this company has had the services of Coburn & Ewing without any compensation whatever. This is no new claim made by Coburn & Ewing, but has been insisted upon at every step. The court has only been put in possession of a portion of the facts. The opinion filed shows the mistakes into which the court has been led. We ask that the case be reheard, and (1) that this application for a decree be denied, and that the parties be left to the agreement which they have made, and that the bills be dismissed.

(2.) Or that the entire evidence bearing on this settlement be heard.

J. G. WATERS,
KARNES & KRAUTHOFF,
*For Coburn & Ewing.*

Said stipulation is in words and figures as follows:

In case numbers 1043, 1069, 1070, & 1072 by agreement the motions for rehearing to be taken up & disposed of next rule day.

KARNES & WATERS,
*For C. & E.*
R. H. FIELD, *For Cattle Co.*

On Sept. 11, 1886, the following notice was filed:

To Judge George W. McCrary:

You are hereby notified that on the 17th day of September, 1886, in the city of Leavenworth, Kansas, before Judge Brewer, we will call up the petition to set aside the decrees in the several cases
46 pending between Coburn & Ewing and the Cedar Valley Land and Cattle Company, Limited, in the circuit court of the United States for the western division of the western district of Missouri.

J. G. WATERS,
KARNES & KRAUTHOFF,
*Attorneys for Coburn & Ewing.*

Kansas City, Mo., Sept. 11, '86.

I hereby accept service of above notice.

GEO. W. McCRARY,
*For Cedar Valley Land & Cattle Co., Limited.*

The following opinion was filed at the October term, 1886, of said court, and on the 8th day of November, 1886:

In the Circuit Court of the United States, Western Division of the Western District of Missouri.

THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited,
*vs.*
JAMES M. COBURN *et al.*

*Opinion.*

BREWER, *C. J.*:

Coburn and Ewing petition for a rehearing.

They object that the decree as entered shows a final settlement of all matters in controversy and dismisses the bills and cross-bills, when in fact there was no final settlement and when under the pleadings no such question was in issue or could be determined.

The facts are these: After bills and cross-bills had been filed some compromise was effected; of that there is no dispute.

The Cedar Valley Company filed a petition alleging that
47 all claims in dispute had been settled and asking a decree accordingly.

A hearing was had; affidavits and other testimony presented without objection. Both parties appeared and argued the question. No objection was made to the form of the proceeding, the only objection being that in fact the settlement was only partial instead of total, and that the court had no right to enquire into the matter, but could only dismiss the bills and cross-bills. Now, it is insisted that if anything had transpired since the filing of the original bills and cross-bills changing or affecting the issues such new matter should have been presented by supplemental bill. I think counsel are right, and that such is the true practice; but that is a mere mat-

ter of form. All the facts were presented as fully and as clearly as though stated in a supplemental bill. No objection on account of form was suggested. Will a party be permitted to test the judgment of the court on the substance of the controversy and upon defeat, then for the first time raise a mere question of form? Nothing can be plainer. When cases of an equitable nature are removed from a State court seldom is the plaintiff's pleading in the full and precise form of a bill in equity. If parties insist, repleading is ordered. But, if not, and all the facts are stated, will the court, after decree, set it aside simply because the pleading does not contain all the formalities of a bill? Such a proceeding would give a bitter irony to the *application* (appellation) of the court as a court of equity. So here it is not pretended that all the facts were not stated, but only that they were not presented through the formalities of a supplemental bill. Coburn and Ewing were cut off from no right; were not prevented from making a full defense. They had every opportunity they asked.

Again, it is insisted that affidavits were used, and not depositions; that no cross-examination was had, &c. But all this
48 was by consent, or at least without objection. They offered affidavits themselves; had all the time they sought for presenting their testimony. They never asked to take depositions or the privilege of cross-examination or time to produce more testimony, of which they now say they have an abundance. They made no objection as to the manner in which the testimony was presented, and I doubt not that if all the testimony had been by oral examination of witnesses in open court such irregularity, if acquiesced in at the time, would have furnished no ground for setting aside the decree based thereon.

He who keeps silent when he should speak must keep silent forever thereafter.

Of the merits of the case I shall add nothing to what I said before when ordering the decree, and of the duty of the court to render such a decree upon the application of either party, when there has been in fact a full compromise and settlement, I have no doubt. The application for a correction of the decree and for rehearing is denied.

DAVID J. BREWER,
*Circuit Judge.*

On the 27th day of November, A. D. 1886, the following entry appears of record in this cause:

WM. N. EWING *et al.*
*against*
CEDAR VALLEY LAND AND CATTLE CO. *et al.*

Now, on this day, the application of the complainants for a rehearing coming on to be heard, the same is argued by counsel and submitted to the court; and thereupon, upon consideration of the

premises, the court orders that the same be denied, and that the cost of said application be taxed against the complainants.

49 And now again come the complainants, by their solicitors, and file petition for an appeal herein to the Supreme Court of the United States; thereupon the following order is filed and ordered to be recorded, to wit:

WILLIAM N. EWING and JAMES M. COBURN, Complainants,
*vs.*
THE CEDAR VALLEY LAND AND CATTLE COMPANY, Limited, Respondent. } No. 1072.

Complainants file petition for an appeal of this cause to the Supreme Court of the United States, and it is ordered that such appeal be allowed on complainants filing a bond, with security to be approved by the clerk of this court, in the sum of $500.00.

Nov. 26, 1886.

DAVID J. BREWER,
*Circuit Judge.*

Said petition for an appeal is in words and figures as follows, to wit:

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri. In Equity.

WILLIAM N. EWING and JAMES M. COBURN, Complainants,
*vs.*
THE CEDAR VALLEY LAND & CATTLE COMPANY, Limited, Repondent. } No. 1072.

To the Honorable David J. Brewer, judge of the circuit court of the United States in and for the western division of the
50 western district of Missouri:

This day come William N. Ewing and James M. Coburn and pray the court to enter an order of this court allowing an appeal and to allow an appeal of this cause to the Supreme Court of the United States, and to fix the amount of bond and security to be required, and that such bond and security shall be approved by the clerk of this court.

JAMES M. COBURN AND
WILLIAM N. EWING,
*Complainants.*
By KARNES AND KRAUTHOFF,
WATERS AND HENRY N. ESS,
*Their Attorneys.*

On the 3rd day of December, 1886, the following entry appears of record, to wit:

J. M. COBURN *et al.*
*against*
CEDAR VALLEY LAND AND CATTLE CO.

The following order was this day filed and ordered to be recorded, to wit:

J. M. COBURN *et al.*
*against*
CEDAR VALLEY LAND & CATTLE CO.

This day come complainants, by their solicitors, and present to the court their bond for appeal and a citation in the above-entitled cause; whereupon, upon due examination thereof, said bond is by the court approved and said citation signed.

(Signed) A. KREKEL, *Judge.*

Said bond for appeal is in words and figures as follows:

51 UNITED STATES OF AMERICA, *set:*

WM. N. EWING and JAMES M. COBURN, Complainants, *v.* THE CEDAR VALLEY LAND & CATTLE COMPANY, Limited, Respondent. — In Equity. Case No. 1072.

Know all men by these presents that we, James M. Coburn and William N. Ewing, as principals, O. P. Dickinson and L. J. Talbott, as sureties, are held and firmly bound unto the Cedar Valley Land & Cattle Company, Limited, its successors and assigns, in the sum of five hundred dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of Dec., A. D. 1886.

Upon this express condition, to wit: Whereas the above-named James M. Coburn and William N. Ewing have prosecuted their appeal to the Supreme Court of the United States — for the western division of the western district of Missouri: Now, if the above-named James M. Coburn and William N. Ewing shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to made good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

WM. N. EWING. [SEAL.]
JAMES N. COBURN. [SEAL.]
O. P. DICKINSON. [SEAL.]
L. J. TALBOTT. [SEAL.]

The above bond is hereby approved and ordered to be
52 filed and made a part of the record.

A. KREKEL, *Judge.*

UNITED STATES OF AMERICA,
*Western Division of the Western District of Missouri,* } *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for said division and district, do hereby certify that the foregoing is a true and complete transcript of the pleadings, proceedings, and final decree in the cause wherein William N. Ewing and James M. Coburn are complainants and The Cedar Valley Land and Cattle Company, Limited, is defendant as fully as the same remains on file and of record in my office.

Witness my hand as clerk and the seal of said court.

Done at office, in the city of Kansas, this 18th day of February, A. D. 1887.

{ Seal of the United States Circuit Court for the Western District of Missouri, Western Division. }

H. C. GEISBERG, *Clerk,*
By WARREN WATSON, *D. C.*

Endorsed on cover: W. Missouri C. C. U. S. No. 142. James M. Coburn and William N. Ewing, appellants, *vs.* The Cedar Valley Land & Cattle Company (Limited). Filed October 4, 1887.

# In the Supreme Court of the United States.

OCTOBER TERM, 1890.

JAMES M. COBURN AND WILLIAM N. EWING,
*Appellants,*
*v.* No. 139.
THE CEDAR VALLEY LAND AND CATTLE COMPANY,
(LIMITED.)

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STATEMENT OF CASE, ASSIGNMENT OF ERRORS AND BRIEF BY THE APPELLANTS.

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HENRY N. ESS and
KARNES, HOLMES & KRAUTHOFF,
Solicitors for Appellants.

# In the Supreme Court of the United States.

OCTOBER TERM, 1890.

JAMES M. COBURN AND WILLIAM N. EWING,
*Appellants.*
*v.* No. 139.
THE CEDAR VALLEY LAND AND CATTLE COMPANY,
(LIMITED.)

## STATEMENT OF CASE, ASSIGNMENT OF ERRORS AND BRIEF BY THE APPELLANTS.

Prefatory to a statement of the case, it may be mentioned that there are four cases on the docket of this Court between the same parties and involving practically the same questions. The cases are numbered 139, 140, 141 and 142, respectively. In form, a separate statement is submitted in each case, but to disclose to the Court the precise points presented for decision, it is necessary that the matters disclosed by the records in all of these cases should be stated. Hence, the four records will be abstracted and the result presented as a statement of each case submitted for consideration.

(*a.*) On October 10, 1885, The Cedar Valley Land and Cattle Company, Limited, an English corporation, filed

its bill against William N. Ewing and James M. Coburn, in which it was alleged that Duncan Stewart and others having ascertained that the defendants were willing to join with them in forming a corporation for the purpose of purchasing a ranch, with the cattle and horses thereon, then belonging to one William B. Munson, and situate in the State of Texas, agreed among themselves to become the promoters of such corporation. That accordingly the corporation was formed, and Stewart, Burnett, Campbell and Fisher, as its board of directors, directed and requested the defendants to buy said property from Munson on behalf of said proposed corporation, and that the defendant Ewing entered into a written contract with Munson for such purchase, which contract is set out at length in the bill. The bill also alleged that said contract was made in contemplation of said proposed corporate organization, and with the intention that it should be adopted by said corporation when formed and enure to its benefit. That said contract was so adopted, and the corporation proceeded to carry the same out. That a number of payments required to be made by said contract were remitted to the defendants for the purpose of being paid to Munson under said contract. But that in August, 1885, said corporation learned that said Coburn and Ewing had secretly agreed with Munson for a commission from him for selling said property, and did receive in various ways about forty thousand dollars from said Munson on that account. The bill asked a decree against them for such amount as they might have been found to have received, upon an accounting to be had by the Court, etc.

In due time the defendants answered said bill, denying that they were promoters of said corporation, and alleging that all their agreements and arrangements as to the character in which they should act in the purchase of said ranch property were made with George Burnett, one of the persons named as a promoter and director of the complainant in its bill, and that said Burnett knew that the defendants would be paid a commission by Munson, and that the said defendants

were openly engaged in the business of selling such property for a compensation. That said services were rendered by defendants, involved much labor, and were reasonably worth the amount received from Munson. The answer also alleged that the complainant acquired said ranch for one hundred thousand dollars less than its actual market value. That the only connection which the defendants had with said corporation was, that after it had been organized, Ewing subscribed to its capital stock, pursuant to a contract by which he was appointed its Manager for the term of five years.

Exceptions were filed to the sufficiency of this answer, which were referred to a special master for examination and report. This report was made and the exceptions set for hearing. This is case No. 139.

(*b*) On December 8, 1885, Coburn and Ewing filed a cross-bill against the said The Cedar Valley Land and Cattle Company, pursuant to leave of court, and the proceedings had in that action are here in case numbered 142. That cross-bill alleged that Coburn and Ewing for a number of years had been partners in the business of selling property as brokers and for a commission, and that at all the times mentioned in the complainant's bill they had said Munson ranch in their charge for the purpose of selling the same under an agreement for a reasonable commission to be paid them by Munson. That Burnett, knowing this fact, made an agreement with them to procure a purchaser for said property if they would share their commission with him. That afterwards they were directed by said Burnett to buy said property upon terms and conditions and at specified prices known to the said Burnett; that they entered into said contract with Munson pursuant to directions from said Burnett, and expended a large amount of time and labor in the transaction, a reasonable compensation for which was alleged to be fifty thousand dollars. That some months afterwards, the corporation having been organized in the meantime, it entered into an agreement with Coburn and Ewing that if

they would subscribe one hundred thousand dollars to its capital stock, it would appoint Ewing its Manager for the period of five years at a stipulated salary, which proposition was accepted, the sum of fifty thousand dollars paid on account of such subscription, and the appointment accordingly made. The cross-bill further alleged that said corporation had attempted to annul the contract so made with said Ewing, and, without offering to cancel said subscription, or to return any part of the money paid on account thereof, or tendering or offering to pay the reasonable and expected profit arising from said contract, had attempted to sequester said stock, and had refused to permit its transfer on its books. It was also alleged that the market value of said stock was one hundred and twenty-five thousand dollars, and that the reasonable and expected profit arising out of said contract was twenty thousand dollars. The cross-bill prayed that said corporation might be required to answer nineteen separate interrogatories set forth in the bill, directed to matters peculiarly within the knowledge of said corporation. The prayer of the cross-bill was, that, upon it appearing to the Court that said Coburn and Ewing were entitled to be paid a reasonable compensation for the purchase of said ranch, and that it was the duty of said corporation to pay the same, the Court might decree to said Coburn and Ewing, or such of them as should be found to be entitled thereto, such reasonable compensation, and that said corporation might be required to pay said Coburn and Ewing the value of their stock, less any sum that might be unpaid thereon, and also be required to pay to said Ewing the sum of twenty thousand dollars on account of his reasonable, expected and contemplated profit out of the contract appointing him Manager of said corporation, and also prayed for general relief.

To this cross bill a demurrer was filed, and as grounds the following were assigned:

1. That there is no person named or made defendant therein. (This was based upon the fact that the caption of

the cross bill was "The Cedar Valley Land and Cattle Company, Limited, complainant, v. William N. Ewing and James M. Coburn, defendants.")

2. That there is no prayer for the issuance of subpœna or process thereon.

3. That there is a lack of sufficient averments therein to confer jurisdiction upon this Court.

4. That the matters and things therein or the relief prayed for therein are not in aid of any defense to the original suit of the Cedar Valley Land and Cattle Company, Limited, against said Ewing and Coburn.

5. That there is a want of equity in said cross bill.

(*c*) On October 6, 1885, Coburn and Ewing instituted an action in the State Court against the Cedar Valley Land and Cattle Company and George Dixon Fisher. This cause was afterwards removed to the Federal Court and the proceedings in in appear in this Court in the case numbered 140.

The bill in that case alleged that in March, 1885, Ewing proposed to the defendant Company, on behalf and in the name of Coburn and Ewing, to subscribe for two thousand shares of its capital stock of the par value of fifty dollars each, upon the certain and only condition that the said Ewing should be appointed Manager of said Company for the period of five years. That this proposition was accepted and Ewing appointed accordingly by the directors of said corporation, and thereupon Coburn and Ewing subscribed for said two thousand shares of stock, and paid fifty thousand dollars in full of all assessments and calls which had or have been made on said stock, and that proper certificates has been issued to them accordingly. That Ewing entered upon the duties of Manager and has been continuously employed therein ever since. That on September 7, 1885, the corporation attempted to cancel and terminate the appointment of said Ewing as such Manager by written communica-

tion setting forth that "in consequence of the facts which have come to the knowledge of the Board of Directors connected with your purchase from Mr Munson," they had decided to annul his appointment, and that Mr. Fisher was authorized to take charge of all the property belonging to the Company, and requested the delivery of the same to him accordingly. It was also alleged that there were peculiar reasons of fitness etc., for the employment of the defendant Ewing and that Coburn and Ewing would not have subscribed or taken any shares in said capital stock but for the contract to appoint said Ewing Manager as aforesaid That Ewing, had faithfully performed all of his duties and at no time given the Company any just cause for terminating his appointment That said contract of employment was of great value to said Ewing, and would yield to him a sum aggregating twenty thousand, five hundred ($20,500) dollars for the unexpired portion thereof. It was also alleged that the said Fisher was undertaking to prevent the said Ewing from performing his functions as such Manager, and to take out of his possession all property in his hands as such, without offering to pay or refund the value of said stock to said Coburn and Ewing, or the reasonable damages accruing to Ewing by reason of the failure and refusal of said Company to further perform its contract with him, and without releasing or indemnifying the said Ewing for certain liabilities he had incurred, and for which he was personally liable, on account of said Company; to all of which compensation, reimbursement and indemnity Coburn and Ewing alleged themselves entitled before the said Ewing could be discharged from said appointment; and an injunction was prayed accordingly.

The corporation answered, alleging that no such contract was made for the appointment of Ewing, but that the subscription of said Coburn and Ewing to its capital stock was unconditional. That Ewing was appointed as Manager, but as an entirely separate and distinct transaction. It was ad-

mitted that said appointment was canceled and terminated by the notice mentioned in the bill, and the grounds for such action were set forth as resting practically in the same facts alleged in the bill of the Company in case numbered 139, namely: That Coburn and Ewing had accepted the commission from Munson.

(*d*) On the twenty-third day of November, 1885, The Cedar Valley Land and Cattle Company filed a cross-bill setting up the alleged employment of Coburn and Ewing on behalf of said intended corporation, the making of the contract with Munson, that Coburn and Ewing had received a commission from Munson and secreted the fact thereof from said corporation; that upon discovery of such fact said corporation had annulled Ewing's appointment; that Ewing had done certain acts in hostility to the interests of said corporation, and that the interests of said corporation would be imperiled if Ewing were allowed to continue to manage the same. An injunction was prayed restraining Ewing from acting as such Manager, and from in any wise interfering with the property of said corporation. Coburn and Ewing answered setting up substantially the same facts disclosed in their answer in case numbered 139, their cross-bill in case numbered 142, and their original bill in case numbered 140. The respective applications of Coburn and Ewing for a temporary injunction and of the Cattle Company for a temporary injunction upon its cross-bill came on for hearing in December, 1885. On this hearing a number of affidavits and a large amount of correspondence and other documentary evidence were filed. The Circuit Court made an order granting the temporary injunction prayed for in the cross-bill of the Cattle Company. This is case No. 141.

(*e.*) While the four causes stood in the respective attitudes indicated above, on June 19, 1886, the Cattle Company filed the following paper in each of said causes, styled a "Petition for a Decree," to-wit:

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|---|---|
| CEDAR VALLEY LAND & CATTLE CO., Limited, v. WILLIAM N. EWING ET AL. | 1043. Bill. |
| J. M. COBURN ET AL., v. CEDAR VALLEY LAND & CATTLE CO., Limited. | 1069. Bill. |
| CEDAR VALLEY LAND & CATTLE CO., Limited, v. J. M. COBURN ET AL. | 1070. Cross-Bill. |
| COBURN AND EWING, v. CEDAR VALLEY LAND & CATTLE CO., Limited. | 1072. Cross-Bill. |

Now comes The Cedar Valley Land and Cattle Company, Limited, a party to the above mentioned suits, and petitions the Court to enter an order or decree in each of said cases showing that the matters in controversy therein have all been settled and compromised by the parties and are decreed and adjudged to be finally settled, and ordering that all the said cases be dismissed, the plaintiff in each to pay costs therein, and that the sureties on the injunction bond given by this petitioner be discharged.

And in support of this application the petitioner files herewith true copies of the written correspondence between the parties, embodying their agreement of compromise, and on the hearing of this petition will produce the originals thereof; also affidavit of George Dixon Fisher.

From the papers and affidavits filed, the following facts material to this hearing are disclosed:

I. The first is a paper marked "Received November 12, 1885," as follows:

"Karnes and Waters (who were of counsel for Coburn and Ewing) will recommend any one of the following compromises:

1. C. & E. (Coburn and Ewing) to be paid back the money for their stock, say $50,000.

C. & E. (Coburn and Ewing) to pay back the sum of $40,000.

Ewing to resign the management.

The Company to enter its appearance in a suit to be brought by C. E. (Coburn and Ewing) to determine the value of their services and commission in purchase of property, leaving out all transactions between C. & E. (Coburn and Ewing) and W. B. M. (W. B. Munson.)

2. The Company to allow C. & E. (Coburn and Ewing) $25,000 as their commissions for the purchase of the ranch; C. & E. (Coburn and Ewing) to pay balance of $40,000; Company to pay back amount of stock; each party to pay costs made by themselves.

3. Arbitrate by three persons, one selected by each, they to choose a third, what their services shall be, and the Company then to pay the amount set; C. & E. (Coburn and Ewing) to pay $40,000 and Company to pay amount of stock.

Either proposition to be finality as to all the matters embraced in the bill filed by the Company *v.* C. & E. (Coburn and Ewing)."

II. The second paper was named a response to these propositions, and was as follows:

"Adams and Field and Geo. W. McCrary will recommend to their client, The Cedar Valley Land and Cattle Company, a settlement with Coburn and Ewing as follows:

1. C. & E. (Coburn and Ewing) to be allowed for their stock what they have paid on it.

2. C. & E. (Coburn and Ewing) to pay back to the Company the sum of $40,000.

3. Ewing to surrender management.

4. This settlement to be a full and final adjustment of all the controversies between the parties and of all claims of either party against the other.

5. No delay of legal proceedings in consequence of these negotiations, unless by an agreement the controversies are ended.

This proposition involves the surrender of the Company's claim for the profit on the sale of the Delaware street property, to which we think it entitled, and which will, we suppose, amount to the sum of about $15,000, as well as other claims set forth in its bill.

And it involves also the allowance for the stock of C. & E. (Coburn and Ewing) of about $10,000 more than its present value.

These are, therefore, the most favorable terms we can recommend, and under no circumstances can we advise the payment of commissions to C. & E. (Coburn and Ewing) or any waiver of the Company's right to defend against any claim that they may make on this account."

III. The third was a letter dated December 28, 1885, from J. V. C. Karnes to George W. McCrary, in which it was stated that Mr. Karnes had always felt inclined to some amicable adjustment, and took the liberty of writing, entirely upon his own responsibility, and induced to do so by a statement made to him by a mutual friend of both parties to the effect that further negotiations would still be considered; and inquiring whether Judge McCrary would resume such negotiations.

IV. Judge McCrary replied that Mr. Fisher, the accredited attorney-in-fact of The Cedar Valley Company, was then out of the city, but that it was probable that he was still disposed to make a settlement.

V. Mr. Karnes on the same day wrote to Judge McCrary that after having gone over the matter with Mr.

Coburn, he believed that a settlement "approximately as follows" could be made:

"1. That the stock of Coburn and Ewing be taken at $50,000.

2. That Coburn and Ewing pay back to the Company the $40,000 received from Munson.

3. That the Company, with American securities, indemnify C. & E. (Coburn and Ewing) against any claim of the representatives of Burnett as to the $16,800.

4. That all suits be dismissed, each party paying his own costs, all claims for damages or compensation be waived, and full receipts passed.

5. That the salary of Ewing up to the time of his discharge be paid to him, amounting to about one month's pay, and that there be paid a few small items of expense, amounting in all to a very small sum."

The third item mentioned in this proposition referred to a payment of the sum named which Coburn and Ewing claimed to have made to Burnett, then deceased, on account of his portion of the commission which they had received from Munson, in pursuance of the contract between them referred to in the pleadings.

VI. On January 5, 1886, Judge McCrary advised Mr. Karnes that the Company had no right either to purchase or provide for the cancellation of the stock held by Coburn and Ewing, and that if any proposition was made which would leave that stock in the hands of Coburn and Ewing, Mr. Fisher, who intended to leave for London in a few days, would lay the whole matter before the Company's Board of Directors.

VII. Replying to this, the following proposition was submitted on behalf of Coburn and Ewing, under date of January 26, 1886:

"Messrs. Coburn and Ewing have 2,000 shares in the C. V. L. & C. Co., (Cedar Valley Land and Cattle Company) £5 paid on each, amounting to about $48,800. They will settle the controversy with the Company:

1. By returning the $40,000 commission and the Company's taking their stock at the actual amount paid by them; or,

2. They will turn over to the Company 1,600 shares and retain 400.

3. In any event C. & E. (Coburn and Ewing) are to be protected against any claim by Burnett's estate, either by a release or an indemnity.

4. Messrs. C. & E. (Coburn and Ewing) agree not to buy up or otherwise molest any of the ranch privileges now enjoyed by the Company.

5. This settlement in no way to affect the arrangements heretofore made concerning the W. & L. cattle, but the same to be carried out by both parties in good faith as agreed upon and not to enter into this arrangement in any way whatever. In other words, the W. & L. cattle are in no way taken into consideration in this settlement.

6. The balance of salary as compensation to be paid to Mr. Ewing."

VIII. On February 2d, Judge McCrary submitted a letter received from Mr. Fisher, *en route*, suggesting that Coburn and Ewing might agree to pay back the commission which they had received with interest at eight per cent. and retain their stock, the Directors securing them a loan upon it for forty thousand dollars, bearing ten per cent. interest, the proceeds to be paid to the Company, and that Coburn and Ewing should pay the expenses of the Company in connection with the litigation. Mr. Karnes replied to this, stating that the terms were so unreasonable that he would decline to submit the same to his clients.

Later in February, the Company cabled: "Ewing's proposal declined. Letter posted to-day enclosing only terms which will be accepted."

IX. On February 24th, Judge McCrary enclosed a copy of the letter received by him from the Company, and expressed the hope that the terms offered would be accepted. On February 27th, the following reply was made to this communication:

Kansas City, Mo., Feb. 27, 1886.

Judge Geo. W. McCrary, City.

DEAR SIR: On February 4th, 1886, you handed to J. V. C. Karnes, Esq., one of our counsel, a copy of the letter which you had just received from the secretary of the Cedar Valley Land and Cattle Company, which is as follows:

THE CEDAR VALLEY LAND & CATTLE CO., LIMITED.

Morgate Street Chambers, London, E. C., Feb. 11, 1886.

DEAR SIR: The board have had under their very careful consideration Mess. Karnes & Ess' letter, dated the 26th January, 1886, containing two alternative offers by Mess. Coburn & Ewing for the settlement of the claims made by the Cedar Valley Land & Cattle Company upon them.

I am instructed to inform you that neither of these propositions is acceptable, and that the action against Mess. Coburn & Ewing must proceed. With that view the answer to Mess. Coburn & Ewing's cross bill, has been forwarded to Mess. Adams & Field along with a letter from the solicitors of the Company.

The Company being liable in a large sum of costs, which will not be recovered from Mess. Coburn & Ewing, the only terms upon which the board can agree to compromise the claim of the Company are as follows:

1. That the amount payable to the Company by Mess. Coburn & Ewing be £10,000, the amount paid by them fo the 2,000 shares now standing in their names.

2. That of this amount, £4,000 shall be paid in cash; or in lieu thereof, that the cattle of the L. & W. herd now upon

the Cedar Valley ranch shall be accepted as cash, when counted over this spring, upon a valuation to be made by two valuers—one chosen by Coburn & Ewing and one by the Company—the valuers appointing a referee.

3. That the balance then remaining due to the Company will be discharged by the transfer to such person or persons as may be named by the board of a sufficient number of Mess Coburn & Ewing's shares on the basis of a par value. the shares then remaining in the hands of Coburn & Ewing to be held by them for a period of not less than two years.

4. Mess. Coburn & Ewing to give security that they will not buy up or otherwise molest any of the ranch privileges enjoyed by the Company.

5. The Company agree to protect Coburn & Ewing against any claim from the executors or the partner of the late Geo. Burnett.

When the board consider (1) that the issue has practically been decided against Mess. Coburn & Ewing by the same judge before whom the case will ultimately be tried; (2) that Mess. Coburn & Ewing have received from Mr. Munson the sum of $75,000 for a property which, in the written estimate of six of the eminent valuers in Kansas City, is worth from $45,000 to $50,000; (3) the almost insuperable difficulty which the board will have in placing any of the shares transferred by Mess. Coburn & Ewing in consequence of non-payment of a dividend resulting from Mr. Ewing's vindictive or ill-judged action in ordering the beeves back to the ranch, and (4) the interest upon the amount of commission obtained in various ways from Mr. Munson from the period of its receipt up to the present date, which, we are advised, would be recoverable from them by an action at law, the board is of the opinion that the foregoing offer is more favorable to Mess. Coburn & Ewing than the latter had any right to expect. The board, however, is induced to offer these easier terms with the object of settling the matter

before the general meeting of the 4th of March. It is therefore to be distinctly understood that this proposal only remains open until the 3rd of March, and that failing the receipt on or before that date of a telegram announcing that Mess. Coburn & Ewing have signed an agreement embodying the above terms, the offer made by the board is withdrawn on that day. It will suit the Company infinitely better to receive the amount of their claim in cash, as would be the case when a judgment had been recovered in their favor, than to have to deal with any large number of shares transferred by Mess. Coburn & Ewing. It is to be understood that the offer is to be made without prejudice to any claim for damages which the board may have against the executors or the partner of the late George Burnett.

The directors desire me to add that in the event of the foregoing offer being refused they will feel it their duty in the interests of the shareholders, to claim full compensation for damages which the Company have sustained under various heads, which are clearly attributable to the account of Mess. Coburn & Ewing.

I am, dear sir, yours truly,

JAMES E. WEBB, *Sec'y.*

GEO. W. MCCRARY, Kansas City, Mo., U. S. A

And on February 26th, 1886, you sent to Mr. Karnes the original letter you had on that day received from the same party, and which was as follows :

THE CEDAR VALLEY LAND & CATTLE COMPANY, LIMITED.

Morgate Street Chambers, London, E. C., 12th Feb., 1886.

Dear Sir : In reading over the letter which I had the pleasure to address to you yesterday I notice two points in reference to which I would like to make some observations.

The sum of £10,000 is fixed as the damages to be paid by Mess. Coburn & Ewing, and it is added that this sum was the amount paid by Mess. Coburn and Ewing for their shares. Seeing that there is no connection whatever between the claim

for damages and the payment for shares, it is advised that the words "the amount paid by them for the 2,000 shares now standing in their names" be eliminated from the letter; if you think advisable to read it or give a copy of it to Mess. Coburn & Ewing.

The words "vindictive or ill-judged," on page 3 of the letter should also be eliminated, as Mr. Ewing in his letter of 24th Oct. last, stated that he was acting for the best interests of the stockholders in turning back the beeves. These words are unnecessary, although the directors could not possibly approve a step which precluded the possibility of paying a dividend, the nonpayment of which would have, as had been fully explained to Mr. Ewing, such an injurious effect on an English Company If Mess. Coburn and Ewing should prefer to deliver the cattle of the L. & W. herd, now on the Cedar Valley ranch, the transfer of 1200 shares would be accepted by the board at present, leaving the balance of £4,000 to stand over in the meantime. If the valuation of the L. & W. herd shall eventually fall short of that sum, the balance of such valuation to be made up to the Company by the transfer of an equivalent number of shares in the Company on the basis of a par value, the board of the above cattle to be paid for at the time of transfer at the agreed on rate $1.50 cents per head.

The board is quite ready to agree to Mr. Ewing's stipulation that he shall be paid his salary during such time as he remains in the service of the Company, whatever amount may be found to be due to him upon a proper adjustment of accounts.

Will you kindly bear these points in mind in dealing with the other side?

I am, dear sir, yours truly,

JAMES E. WEBB, *Sec'y*

GEO. W. MCCRARY, ESQ.,
Kansas City, Mo., U. S. A.

Both of these communications, together with your two letters forwarding them to Mr. Karnes, he has placed in our hands. In connection with both our counsel we have fully considered the terms of this proposition. We wish to state emphatically that we regard the proposition as unjust and oppressive, but we have so much involved in this litigation that we agree to and accept the terms of the offer made. The £4,000 will be arranged for with the L. & W. cattle, as suggested in the letter of February 12th, and the 1,200 shares of stock therein mentioned we herewith hand you to be transferred to such parties as may be named. We have only two certificates of one thousand shares each, and we deliver both to you, and the Company can return us a certificate for 800 shares. The bond called for by the fourth section of the proposition in the letter of February 11th we will give at any time. It will now soon be the season when the L. & W. cattle can be counted, and we will be ready at once to name valuers. Now that a settlement has been affected, we hope there will be no delay in carrying it out in all respects as agreed upon.

We desire to express to you our thanks for the uniform courtesy with which you have treated us throughout this unpleasant matter. We are, dear sir, very truly,

W. N. EWING.
JAMES M. COBURN.
COBURN & EWING.

X. On February 27th Judge McCrary wrote to Coburn and Ewing, stating that he had received their letter accepting the terms of compromise proposed, and also certificates for two thousand shares of stock held by them in the Company; that he would wire the Company to that effect, and write requesting that it take immediate steps to close up the matter of the compromise; and that "of course it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties."

XI. Some further correspondence ensued as to the manner in which the two thousand share certificate of Coburn and Ewing should be split up so as to transfer to the Company the number of shares mentioned in the compromise.

XII. The affidavit of George Dixon Fisher set out that on April 29th, 1886, he called on Mr. Coburn for the purpose of submitting to him a form of bond to be given by Coburn and Ewing under the compromise; and that Mr. Coburn changed the draft of the instrument so as to add after the phrase "accepting terms of compromise," which appeared in the original, the further phrase "of all pending litigation."

This instrument, however, was never signed or agreed upon.

XIII. The affidavit of J. V. C. Karnes was also filed, in which he stated that after the correspondence with Judge McCrary on February 27th, 1886, and on the same day, Mr. Field, one of the attorneys for the Cedar Valley Land and Cattle Company, brought to his office a statement prepared by Judge McCrary, to the effect that the settlement as agreed on of that date was to be in full of all claims or demands between the respective parties to such litigation; and that he then told Mr. Field that such paper would not be signed; but that Coburn and Ewing had settled their matters with the Cedar Valley Company on the propositions of February 11th and 12th, 1886, and the unconditional acceptance of these propositions on Febuary 27, 1886, and that under no circumstances would the settlement be supplemented by any further agreement. That all previous propositions made by the parties were withdrawn and had been rejected when said letter of February 27th was prepared, and that in order to avoid any misunderstanding on that point, the terms offered by the Company were copied in full in the letter of acceptance, and that in all transactions had since that day, the letter

of February 27th had been permitted to speak for itself, without any addition thereto or subtraction therefrom.

XIV. James M. Coburn stated that when the propositions of February 11th and 12th were considered, all previous propositions had been rejected. That the terms submitted, mentioned in the letter of February 27th, were in nearly all respects entirely different from those which had been previously made to the Company, and that the terms as proposed by the Company would not have been accepted had they not been substantially that it left open to Coburn and Ewing to make claim, if any they had, against said Company for services rendered in the purchase of said ranch. That in the early correspondence this matter was distinctly referred to; but that in the later correspondence no mention was made of this compensation, and consequently, to avoid any misunderstanding upon the subject, the terms proposed by the company were unconditionally accepted. That the letter of Judge McCrary shown as number X., dated February 27th, 1886, was received and submitted to affiant's counsel, who advised him that on the Saturday previous he had distinctly informed Mr. Field, one of the counsel for the company, that receipts in full were not to be passed, and that, therefore, there was no necessity of making any reply to Judge McCrary's letter, as it was well known by counsel for the Company that Coburn and Ewing did not propose to settle all matters in dispute between them and the Company, for which reason alone affiant did not further answer the same. That in every step taken in closing up said compromise, Coburn and Ewing have distinctly refused to sign any receipts in full or to acknowledge any settlement in full; but that in the many receipts that have been passed language indicating a settlement in full was in each case stricken out and in lieu thereof it was inserted that the receipt was given on the basis of the letters of February 11th, 12th and 27th; that affiant has no recollection concerning the interlineation made in the paper attached to the affidavit of Mr. Fisher; but that he

knows that there was no intention to do or say anything indicating that Coburn and Ewing intended to abandon their claim for services. That every step taken in the purchase of said ranch was in the utmost good faith with strict regard to the interests of the Company, and that acting upon the claim made by said Company, Coburn and Ewing have paid to it more than they ever received from said Munson, and that for their services rendered in the purchase of said ranch they have received no compensation whatever.

XV. The affidavit of George W. McCrary stated that the understood the compromise proposition to cover all the matters in litigation and that if he had been informed that Coburn and Ewing would insist that only one side of the controversy had been settled he would have tendered back the stock certificate which he had received, and declined to have gone on with the compromise. That having heard an intimation it would be claimed that the settlement made did not embrace all the matters in litigation, he wrote the letter shown as No. X.

XVII. The affidavit of R. H. Field stated that on February 27th he presented to Mr. Karnes a paper pre-prepared by affiant after a consultation with his associate counsel; but that such paper was destroyed by affiant after the declination of Mr. Karnes to sign the same. That when this paper was presented to Mr. Karnes he replied that he would make no other agreement of settlement for Coburn and Ewing, but assured affiant that the sureties on the Company's injunction bond would not be harmed or disturbed; and that upon these assurances affiant dropped the matter and did not further urge the signature to such writing.

On August 2, 1886 a decree was entered and recorded in each of the four cases, as follows:

"This case came on to be heard on the petition by the said Cedar Valley Land & Cattle Company, Limited, for final decree settling and adjudicating all the issues herein, George W. McCrary and Adams & Field appearing for respondent, and J. V. C. Karnes and Joseph G. Waters appearing for complainants; and the court, having heard the evidence and the argument of counsel, sustains said petition; and it is therefore ordered, adjudged and decreed that there has been, by the agreement of the parties, a full compromise and settlement of all the matters in controversy in this case; and it is ordered, in pursuance of the agreement of the parties, that the bill be dismissed at the cost of the complainants, to be taxed."

On the same day Coburn & Ewing moved the Court to set aside and vacate the decree entered in each of said causes and to grant them a rehearing, assigning the following grounds:

"1. The evidence on which this decree was based consists entirely of correspondence between counsel and affidavits, and it nowhere appears that any form of entry was ever agreed upon or ever spoken of, other than that the bills and cross-bills should be dismissed, each party paying his own costs. The settlement made was wholly outside of the Court and was not pleaded, and the Court has no jurisdiction to supplement the agreement of the parties by decreeing a final settlement.

2. The Court overlooked the testimony showing that the counsel for the Cedar Valley Land & Cattle Company, before writing the letter to Coburn & Ewing in which he stated 'of course it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties,' had written a stipulation embodying the same idea and submitted the same to the counsel for Coburn & Ewing, who had peremptorily refused to sign it, and that the counsel for the Company, knowing this refusal, did not offer to return the stock and

terminate the arrangement, but held the stock, and in a letter to Coburn & Ewing assume l a state of facts to exist which he ought to have known did not exist. In overlooking this previous occurrence the court committed an error.

3. The Court further erred in reaching the conclusion that the details of the settlement were carried out by Coburn & Ewing without disclosing their understanding that this was not intended as a full settlement. The evidence will show that at every step the counsel for the Company had full knowledge that this claim would be made, and every word was excluded from the receipts and other papers passed between the parties which could in any way be construed into a final settlement of all matters in dispute. These receipts and other papers were not in evidence, but as it has been assumed that the Company completed the arrangement on the belief that it was in full, we would ask to furnish copies of such papers and full affidavits covering these points.

4 The Court erred in concluding there was a lack of 'good faith and fair dealing' on the part of Coburn & Ewing in making said settlenent. A proposition was made by the Company and accepted by Coburn & Ewing. In less than an hour afterward a paper was prepared by counsel for the Company engrafting upon the settlement as made additional terms, reciting that this was in full of all matters in dispute. This was promptly declined by counsel for Coburn & Ewing. The stock could have been returned, but it was retained, and an effort made again to have Coburn & Ewing committed to a full settlement by the letter which was written. In the progress of the settlement the forms for receipts were carefully prepared, so as to exclude the idea that it was a full settlement. The evidence will disclose the fact that this Company has carefully sought from the beginning to recover the last cent possible from Coburn & Ewing, and at the same time has been unwilling to have the claim made by Coburn & Ewing judicially determined. To refute this imputation of unfair dealing, your petitioners would ask that they be

permitted to offer in evidence the papers as originally prepared for carrying out the details of the settlement and the changes in them insisted upon by Coburn & Ewing and allowed by said Company, showing that at all times from the acceptance of the proposition the Company had full knowledge of the understanding of Coburn & Ewing and what they would insist upon, and that 'good faith and fair dealing' would have required the Company to have then repudiated the arrangement, instead of taking to itself all the benefits arising therefrom.

5. Full and complete evidence will show that the interlineation made by J. M. Coburn in a bond has been wholly misunderstood. This bond was never used, and this change was made at a time when it was sought to agree upon these forms of carrying out the details, and in using this expression 'pending litigation,' reference was had solely to the claim made by the Company, and when subsequently understood that it might be construed to cover both bills and cross-bills, this expression was not used and nowhere appears in the papers so used in settlement; all of which can be shown by a full statement of all the evidence bearing on this point.

6. The evidence discloses that this Company has had the services of Coburn and Ewing without any compensation whatever. This is no new claim made by Coburn and Ewing, but has been insisted upon at every step. The Court has only been put in possession of a portion of the facts. The opinion filed shows the mistakes into which the Court has been led. We ask that the cause be re-heard, and,

1. That this application for a decree be denied, and that the parties be left to the agreement which they have made, and that the bills be dismissed;

2. Or, that the entire evidence bearing on this settlement be heard."

These motions were overruled on November 8, 1886. Thereupon Coburn and Ewing applied for and were granted an appeal to this Court; the bond required was filed and approved, and the citation issued December 2, 1886; the transcript certified February 18, 1887, and filed in this Court October 4, 1887.

## ASSIGNMENT OF ERRORS.

The appellants come now and assign the following errors in the rulings of the Court below, and in the record of the proceedings of said Court:

1. Said Court erred in sustaining the "petition for a decree" filed by The Cedar Valley Land and Cattle Company.

2. The Court erred in entering a final decree upon a mere motion.

3. The Court erred in deciding the question as to the meaning of the contract of settlement between the parties under the pleadings in this cause.

4. The Court had no jurisdiction to render any decree construing a contract made between the parties pending the litigation, upon a mere motion.

5. The Court erred in overruling the motion to vacate its decree and to grant a rehearing filed by the appellants.

6. The decree of the Court below concluding Coburn and Ewing from instituting procedings to recover the amount claimed to be due them, in the absence of a proper pleading presenting the matter for adjudication and a trial thereof in accordance with some procedure recognized by chancery practice, was a denial of due process of law.

7. The Court below had no jurisdiction to pass upon a matter outside of the scope of the pleadings.

8. The said contract of compromise was erroneously construed to conclude Coburn and Ewing from making any claim against The Cedar Valley Land and Cattle Company for services rendered by them in purchasing the property from Munson.

9. The Court erred in holding that any right existing in Coburn and Ewing to be compensated by The Cedar Valley Land and Cattle Company for services rendered on its behalf was covered by the compromise agreement between the parties.

## BRIEF.

### I.

(*a*) The rule is clear and well settled that a court of equity has no jurisdiction to render a decree except only in pursuance of allegations made in the form of a bill, either original, cross or supplemental. This rule has been declared to be "too well established to be disregarded." It has been held to disable a court to grant relief, although a right thereto appeared from the answer of the defendant, or from the evidence adduced at the hearing. However broad in terms the language of a decree may be, it is limited in effect to the allegations of the bill. Where a cross-bill is filed by the original defendant, the complainant in the original bill becomes a defendant to that cross-bill, and can have no affirmative relief upon the issues made under it.

*Carneal v. Banks*, 10 Wheat., 181, 189.
*Harding v. Handy*, 11 Wheat., 103, 120.
*Piatt v. Vattier*, 9 Pet., 405, 415.
*Jackson v. Ashton*, 11 Pet., 229, 249.
*Knox v Smith*, 4 How., 298, 317.
*Foster v. Goddard*, 1 Black, 506, 518.
*Barnes v. Chicago Railway*, 122 U. S., 1, 14.
*Veach v. Rice*, 131 U. S., 293, 317.
*Central Railroad Co., v. Central Trust Co.*, 133 U. S., 83, 90.
*Story, Eq. Pl.*, (9 Ed.) Sec. 393.
*Chapin v. Walker*, 6 Fed. Rep., 794.
*Armstrong v. Chemical Nat. Bk.*, 37 Fed. Rep., 466.
*Borckman's Appeal*, 10 Atl. Rep., 425.
*Gordon v. Gordon*, 3 Swanst, 400, 472.
*Nokes v. Fish*, 3 Drewry, 735, 744.

Where an agreement is made, pending the suit, compromising the matter in litigation, the proper procedure is to bring that agreement before the court in the form of a supplemental bill, or by a plea like unto one *puis darrein continuance* in common law pleading. Otherwise such agreement cannot be noticed.

*Yeaton v. Lynn*, 5 Pet., 224, 231, 232.
*Hobson v. M'Arthur*, 16 Pet., 182, 194.
*Gandler v. Pettit*, 1 Paige, 168.
*Jackson v. McCall*, 3 Cow., 75, 79.
*May v. Coleman*, 84 Ala., 325.
*Bower v. Swadlin*, 1 Atk., 294.
*Taunton v. Pepler*, 6 Madd., 166.
*Roche v. Morgell*, 2 Sch. & Lef., 721.

As long ago as 1665, Lord Chancellor Clarendon, declared that an agreement compromising the matters in dispute could not be offered at the trial unless it had been presented to the court by a proper pleading. The correct practice was held to be to stay the principal cause until a proper bill could be filed setting up the alleged release, and the matter tried upon issues made in accordance with established rules of procedure.

*Hayne v. Hayne*, 3 Ch., 19, (*folio.*)

Standard text-books say, referring to the same subject, that the alleged compromise "not being in issue in the cause, the court could not try the fact or direct a trial for that purpose. A new bill must be filed to put the release in issue. Without being put in issue in the cause by new bill, it cannot be used in proof."

*Mitf. & Tyl. Eq. Pl. & Pr.* (Ed. '82,) p. 180.
*Story Eq. Pl.* (9 Ed.,) Sec. 393.

In accordance with these rules it has been settled that a mere motion cannot form the basis of a final decree.

*Like v. Beresford*, 3 Brown Ch., (by Eden,) 366.
*Fenton v. Farlick*, 8 Johns., 194, 197.
*Willis v. Parkinson*, 3 Swanst., 233.
*Tullett v. Armstrong*, 1 Keen, 428, 435.
*Fuller v. Met. Life Ins. Co.*, 31 Fed. Rep., 696.

The correctness of these rules and their application to the facts of this case were practically conceded in the opinion delivered by the Circuit Court overruling the motion for rehearing. But that Court also ruled that Coburn & Ewing had *waived* their right to make this objection by resisting the motion and by introducing affidavits in opposition thereto. Independent of the question whether such conduct would amount to a waiver, it is very clear that the objection made is of so fundamental a character that it is not susceptible of being waived.

Tested by the well-settled rule that the Federal Courts, sitting as courts of equity, are tribunals of limited jurisdiction, and that unless a matter is presented to that Court in conformity to the rules governing pleadings and practice in chancery, the court is without jurisdiction over the subject-matter, the fallacy of the ruling below is apparent. That ruling practically decides that jurisdiction over the subject matter can be conferred by consent. The decisions of this court have been uniform that where a case is not cognizable in a court of equity, or not presented to such a court by proper pleadings, a jurisdictional defect exists, which may be taken advantage of at any stage of the proceeding and which cannot be waived by the conduct or agreement of the parties.

*Thompson v. Railroad Co.*, 6 Wall., 134, 137.
*Sullivan v. Portland R. R.*, 94 U. S., 806, 811.
*Oelrichs v. Spain*, 15 Wall., 211, 227, 228.

*McDonald v. Hobson*, 7 How., 745, 758.
*Parker v. Mfg. Co.*, 2 Black, 545, 550.
*Story Eq. Pl.* (9 Ed.) Secs. 10, 34, 257, 264.
*Chase v. Palmer*, 25 Me., 341, 345.
*Chambers v. Chalmers*, 4 Gill & J., 420, 438.
*Herbert v. Hobbs*, 3 Stew., (Ala.), 9, 14.

In an early case it was strenuously urged in answer to objections such as her made, that all of the parties had appeared and participated in the trial of the matter in controversy, had introduced evidence on the subject and submitted their respective claims for decision, and that consequently "it would be monstrous that rights should be made to depend in the appellate court on a mere defect in the pleadings which had entirely escaped observation in the court where it might have been amended, and the non-existence of which would not have varied the case," but this Court, speaking through Mr. Chief Justice Marshall, nevertheless sustained the objection, and said: "The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery; rules which have been established for ages on the soundest and clearest principles of general utility. If the pleadings in the case were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend, * * all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts."

*Crockett v. Lee*, 7 Wheat., 522, 527, 528.

This ruling has been steadfastly adhered to ever since.

Thus it has been said that it was "a point of great importance to the practice of a court of equity" that its jurisdiction be exercised only over matters of equitable cognizance, and then only when presented in accordance with the forms of the court. To permit either point to be waived has been deemed to be equivalent to permitting the parties by admission or agreement to change the law or to give jurisdiction over the subject matter by consent.

*Hipp v. Babin*, 19 How., 271, 277, 278.
*Boone v. Chiles*, 10 Pet., 177, 209.
*Harrison v. Nixon*, 9 Pet., 483, 503.

In another case the object of the bill was to enjoin the sale of a railroad under a mortgage; one of the defendants undertook to file a cross-bill alleging himself to be the owner of some of the bonds secured by the mortgage in question, and praying for a decree of foreclosure. No defendants were named in this cross-bill, and no process was prayed for or issued. Without any objection being made, the court below proceeded to hear the case on the original bill and this so-called cross-bill, and rendered a decree as prayed for in the latter. This court held that the so-called cross-bill did not comply with the rules of equity pleading, and consequently could not be made the basis of a decree, and that under "*axioms* in the equity law of procedure," this objection could not be waived, but was fatal at every stage of the proceeding.

*Washington R. R. v. Bradleys*, 10 Wall., 299, 301, 302, 303.
*Reynolds v. Stockton*, 43 N. J. Eq., 311, 314.
*Simonton v. Winter*, 5 Pet., 141, 149.

"Courts can only hear and determine causes on the pleadings actually filed, and not on what the parties or their solicitors may agree they shall be."

*Jones v. Davenport*, 45 N J. Eq., 77, 81, 85.

Where equity rules require formal allegations to be made in given cases, their omission, although strictly a defect of form, is nevertheless fatal to the jurisdiction of the court and cannot be waived.

*Quincy v. Steel*, 120 U. S., 241, 245 *et seq.*

The same rule was applied where there was a failure to assign errors; and in that case it was said that it was not mere objection of form that matters were considered which were not presented by a proper pleading.

*Ditch v. Sennott*, 116 Ill., 288, 290.

But even "the want of due form constitutes a just objection to the proceedings in every court of justice; for, to reject all form would be the destruction of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice. * * * * It has been well remarked, that infinite mischief has been produced by the facility of courts of justice in overlooking errors in form."

*Story Eq. Pl.* (9 Ed.,) Secs. 454, 473, note *a*.

These considerations apply with peculiar force to the case at bar. Here, a decree has been rendered not prayed for in the pleadings, nor warranted by any allegation in either of the bills, original or cross, before the court. More than that, on a cross-bill filed by Coburn and Ewing, affirma

tive relief has been granted to the adverse party. It has been held that this could not be done on an answer; yet here it has been granted on a mere motion. Again, a court of equity has entered upon the question of the proper construction of a contract made between the parties and has rendered a decree declaring such construction. There was no jurisdiction to do this upon a bill filed for that purpose; certainly not, where the contract in question and the construction contended for constituted a defense to any relief sought.

*Grand Chute v. Winegar*, 15 Wall., 373.
*Dowell v. Mitchell*, 105 U. S., 430, 432.
*Ambler v. Choteau*, 107 U. S., 586, 590.
*Marye v. Parsons*, 114 U. S., 325, 329, 330.
*Bristow v Whitmore*, 4 Kay & J., 743, 745.

The matters involved in cases number 139, 140 and 141 were in terms covered by the compromise. In numbers 139 and 141, The Cedar Valley Land and Cattle Company was complainant; in number 140, Coburn and Ewing were the complainants. If either of these complainants refused to dismiss the proceeding, the agreement for a compromise could have been effectually pleaded in bar. (*Adkinson v. Taber*, 7 Colo., 195, 197). The important question was whether the cross-bill of Coburn and Ewing, (number 142 in this Court), embraced the claim of Coburn and Ewing for compensation for services rendered in purchasing the Munson ranch, and if so, whether that claim had been compromised. The agreement of compromise does not refer to it in terms. Whether the claim is included is a question of construction and of proof. It is also a question upon which issue can be taken. The mode of framing this issue is prescribed by well settled rules of pleading. When made in conformity to the requirements of these rules, other rules prescribe the procedure to be observed in trying such issue. The cross-bill referred to (number 142) stood for hearing

upon a demurrer which had been filed by the Cattle Company, by which its sufficiency was questioned and the allegation made that there was no jurisdiction in the court over the subject matter thereof. Pending that demurrer and contrary to its allegations, it is alleged that the court did have jurisdiction over the matter and could render a decree on a motion filed, without taking any action upon the demurrer, to decree affirmatively in favor of the defendant in that cross-bill that the cause of action alleged therein had been compromised between the parties. That compromise was not in the nature of a stipulation providing that such a decree should be entered by the court, but it was an independent contract, made outside of court. Its effect upon the pending cases was a matter for judicial decision. The nature of the motion was such that no issue could be framed upon it, and there is no provision under which testimony could be taken in any regular way in opposition to it. To render a decree under such circumstances giving affirmative relief to a defendant, whose only pleading before the court is a demurrer denying that the bill presents any matter within the jurisdiction of that court, is submitted to present as gross and complete perversion of all "axioms in the equity law of procedure" as can be found in the books. And if the act of Coburn and Ewing in not refusing to resist the motion can be construed to cure the errors and defects in the course pursued, jurisdictional though they may be in their nature, there is no limit to the matters which can be foisted upon courts of equity, nor upon the departure from prescribed rules of pleading and procedure which can be indulged in. It may not be even a step further for the holder of a contract to present it to a court of equity with a motion for a decree establishing a given construction and for the other party to present his defense in the form of affidavits. A decree rendered to the effect that the contract constituted a valid obligation, or that the party opposing the motion had a valid defence to any claim under the contract, or that a construction of it recited in the decree was the proper one, would be regarded as little

less than monstrous. There is no inherent or unlimited power in a court of equity to decide the question of this construction, nor to enter upon a hearing whether or not the construction contended for is erroneous or correct. If the decree rendered by the Court below has any force at all, it is not only an adjudication in bar of the pending suits, but of any other suits which might be brought on the same matters. In short, it is a decree fixing a construction upon a contract which was not before the court on proper pleadings, and resting upon matters arising subsequent to the institution of the proceeding and injected into the case by a paper not known to the law. This paper is one by which a defendant in a cross-bill sought affirmative relief against the complainant. No process was prayed for or issued. It contained no allegations upon which an issue could be made. There is no course of procedure known to the law under which testimony could be taken bearing on the questions raised. And it asks for a decree which a court of equity would have no jurisdiction to enter upon the most formal and carefully drawn bill. That no parallel can be found in the reported cases is not a matter of surprise. Elementary rules, inflexible in character and self-evidently correct, forbid sanction to such a proceeding.

*Killian v. Ebbinghaus*, 110 U. S., 568, 573, 574.
*Smith v. Woolfolk*, 115 U. S., 143, 148.

If in fact the matters undertaken to be pleaded in the cross-bill of Coburn and Ewing were included in the settlement made, and that settlement required the parties to dismiss all pending suits, in case of a refusal of Coburn and Ewing to perform such agreement, the books lay down the proper pleading to be filed alleging the facts and invoking the bar claimed to result therefrom. In cause number 142 this could have been done, if the Court had overruled the demurrer. In all probability that demurrer would have been sustained, both because the cross-bill was defective in form and because

the matters undertaken to be alleged in it were neither the subject of a cross-bill nor sufficient to confer jurisdiction upon the Court. If the demurrer had been sustained, Coburn and Ewing would have been driven to an action at law. If they had chosen to institute such an action, the alleged compromise might still have constituted a defence. So that it is plain that a due and orderly course of procedure fully protected the Cattle Company in its position as to the scope and effect of the compromise agreement. As the cause of action alleged was cognizable at law and the defence complete in the same tribunal, the uniform practice of a court of equity would dictate a dismissal of the entire proceeding, leaving the parties to a trial at law and their constitutional right to a trial by a jury.

*Lewis v. Cocks*, 23 Wall., 466, 473.

(*b*) The course pursued in the case at bar was a denial of due process of law both in substance and in form. To constitute due process of law the remedy must be such as is enforced "by means of orderly proceedings in a court of competent jurisdiction *in accordance with rules and forms established* for the protection of the rights of the parties."

*Kennard v. Louisiana*, 92 U. S., 480, 483.

"A departure from established modes of procedure will often render a judgment void; thus, * * the decree of a court of equity upon oral allegations without written pleadings would be an idle act of no force beyond that of an advisory proceeding of the chancellor. The reason is that the courts are not authorized to exercise their power in that way."

*Windsor v. McVeigh*, 93 U. S., 274, 282.
*Pennoyer v. Neff*, 95 U. S., 714, 733.
*Ex parte Wilson*, 114 U. S., 417.

A judgment rendered without following the forms of the law appropriate to the case, and in accordance with the modes of procedure applicable thereto, does not constitute due process of law.

*Davidson v. New Orleans*, 96 U. S., 97, 105.
*Hurtado v. California*, 110 U. S., 516, 534.
*Hagar v. Reclamation District*, 111 U.S. 701, 708.

As a judicial remedy, "due process of law implies and includes *actor*, *reus*, *judex*, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding."

*Murray v. Hoboken Land Co.*, 18 How., 272, 280.
*McNaughton v. Osgood*, 114 N. Y., 574, 578.

(*c*) Even if the court had jurisdiction to proceed on a motion, the decree ought not to have embodied an affirmative adjudication of an independent fact. If an agreement has been made for the dismissal of a cause, the function of the court is limited to a mere entry of dismissal. To decide more than that and to fix a judicial construction of the contract by decreeing that the matters presented in such action have been included in a compromise, is not the province and, it has been said, "it ought not to be the desire," of the court to do, until presented in the regular way.

*Kidd v. Morrison*, 1 Phil. Eq., 31, 32.
*Stewart v. Southard*, 17 Ohio, 402, 406.
*Foucher v. Grass*, 60 Ia., 505, 507.
*In re Elsam*, 3 B. & C., 597.
*Hoskins v. Lord Berkley*, 4 Term R., 402.

II.

If, however, the question of the construction of the compromise agreement was properly before the Court below, its decision of the same was erroneous. The Cattle Company claimed the right to recover from Coburn & Ewing the commission received by them from Munson. This was on the theory that Coburn & Ewing were the agents of the Cattle Company in the purchase of said ranch. It is not pretended that they have been compensated as such, nor that they agreed to render their services gratuitously. Consequently, it was to be expected when the Cattle Company assumed the position that Coburn & Ewing were bound to pay it the commission received from Munson, that Coburn & Ewing should claim that if they were not entitled to be compensated as the seller's agents because they occupied the position of representatives of the buyer, that the buyer was under obligation to compensate them. This idea runs through the several pleadings filed on behalf of Coburn & Ewing and is emphasized in the cross-bill in case number 142. Accordingly, when the first proposition for a compromise was made on November 12, 1885, counsel for Coburn & Ewing included the item of compensation to them. The proposition was, either that the Company should enter its appearance in a suit to be brought against it to determine the amount of this compensation; or that the Company should allow Coburn & Ewing $25,000 on this account; or that the matter be adjusted by arbitration. The response of counsel for the Cattle Company stated that "under no circumstances can we advise the payment of commissions to Coburn & Ewing or any waiver of the Company's right to defend against any claim that they may make on this account." This last statement was accepted and acted upon by all parties as the ultimatum of the Company in that respect. It was construed to mean that if Coburn & Ewing had any claim for compensation against the Company they

would have to recover it at the end of the law, and that nothing relative thereto could be considered in any compromise that was made. Accordingly, in the next proposition, December 28, 1885, this item was entirely excluded. The like course was pursued in the proposition of January 26, 1886. After the announcement of the ultimatum, all the negotiations proceeded upon the manifest idea that the claim of Coburn & Ewing was not to be included in any arrangement that might be made. The Company took the broad stand that it would not recognize that claim, or negotiate in reference to it. Coburn & Ewing were content to settle the other matters in litigation and then to act upon the position of the Company that this claim would be recognized only when established by the judgment of a court. In short, the Company said, we are willing to compromise the other matters, but as to this, we decline to entertain or make any proposition. That claim was placed beyond the pale of negotiation. In February, the Company peremptorily rejected all the propositions which had been previously made and forwarded an elaborate one of its own. The effect of the previous proposals was stated by the Company in the very first sentence of the letter of February 11th: "For the *settlement of the claim made by the Cedar Valley Land & Cattle Company upon them.*" The communication proceeded to state that "the only terms upon which the Board can agree *to compromise the claim of the Company* are as follows:" It will be noted that in all these elaborate communications not one word is said which bears the slightest degree *upon the claim made by Coburn & Ewing on the Company.* The proposition deals exclusively with claims that the Company has against Coburn & Ewing. It does not pretend to be in full of all claims made by each against the other, nor that any item contained in the proposition is to be construed to neutralize the Coburn & Ewing claim. Among all the arguments made by the Company in favor of the acceptance of its proposition, and in the detailed enumeration of the concessions which it claimed to make, the idea

that Coburn & Ewing's claim was covered by them is not even hinted at.

Construing the contract as it is written and in the light of what had gone before, it is very clear that nothing can be found which justifies the construction that the matter of Coburn and Ewing's claim for compensation was included in and covered by the compromise made. But it is claimed that certain matters occurring *after* the execution of that contract and after its part performance by Coburn & Ewing, had the effect to add to its terms and to bring withing its provisions this Coburn and Ewing claim. At the outset, it is worthy of particular notice that a completely executed contract ought not to have additions made to it by implication, except upon the very clearest evidence of such an intention. It is worthy of like notice, that in construing a contract as made, those matters of subsequent occurrence which are relied upon to place a practical construction upon the contract, must be taken as a whole.

The following circumstances are adverted to in the opinion of the Court below as proving a practical construction that the contract should cover matters not embraced within its terms, and that the ultimatum of the Company previously presented and acted upon in all subsequent negotiations was nevertheless ignored and a matter agreed to be compromised by implication which the Company had declared it would neither recognize nor consider in any negotiations had :

(*a.*) The counsel for the Cattle Company wrote Coburn and Ewing a note in which he casually mentioned that "of course, it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties." The precise circumstances under which this suggestion was made were as follows :

Upon receipt of the unconditional acceptance by Coburn and Ewing of the proposition which had been submitted by the Company, Judge McCrary prepared a stipulation "to the

effect that the settlement as agreed on of that date was to be in full of all claims or demands between the respective parties in the litigation," and caused it to be presented to counsel for Coburn and Ewing for signature, by Mr. Field, one of his associates. Mr. Karnes, on behalf of Coburn and Ewing, "then distinctly told Mr. Field that such paper would not be signed, but that Coburn and Ewing stood squarely on the propositions of February 11th and February 12th, and the unconditional acceptance thereof, and that under no circumstances would this settlement be supplemented by any further agreement:" (In the affidavit of Mr. Field it is stated that Mr. Karnes replied "that he would make no other agreement of settlement for Coburn and Ewing," and from the affidavit of Judge McCrary it appears that "as soon as affiant heard an intimation that it might be claimed the settlement did not cover all the matters in litigation he wrote Coburn and Ewing the letter" containing the clause in question).

When Mr. Coburn received the note containing this clause, he submitted it to Mr. Karnes, and was advised by him that counsel for the Company had already been distinctly informed that receipts in full were not to be passed, and that no further reply to Judge McCrary was necessary; and therefore none was made.

At this stage the Company had taken no step towards carrying the compromise into effect and parted with nothing on the strength of the negotiations had. So far as it stood, the entire matter was executory and its position had not been changed.

On the other hand, Coburn & Ewing had turned over $30,000 worth of stock in part performance of the provisions of the contract on their part. Although counsel for the Company had been distinctly notified of the position assumed by counsel for Coburn & Ewing, and although he had received nothing indicating that that position had been abandoned in reply to his implied inquiry on the subject, counsel held on to the stock, and with this full knowledge of the

status of matters, the Company collected the balance of the money to be paid by Coburn & Ewing.

There is nothing in this occurrence which can be said to constitute a new contract or to supplement one previously made; nor does it disclose an admission by Coburn & Ewing contrary to the construction for which they had contended all the time. It is worthy of emphasis that counsel for the company had been distinctly informed and had full knowledge of the precise position which Coburn & Ewing had assumed as to the construction of the contract. The course was not pursued of addressing a direct question to either Coburn & Ewing or their counsel; nor of saying that if the construction which had been announced by them was insisted upon the stock which they had delivered was herewith returned. On the contrary, with a full knowledge that Coburn & Ewing did insist upon their construction, the Company accepted every dollar that Coburn & Ewing had agreed to pay. It is *the Company* that stands estopped by its conduct from disputing the correctness of the construction made by Coburn & Ewing; it was *the Company* that acted upon that construction and from *the Company* came the acquiescence of a construction announced from the other side; it was *the Company* that failed to place the other parties to the contract in *statu quo* when it become known that there was a controversy as to the construction of that contract; and it was *Coburn & Ewing* who changed their position and parted with fifty thousand dollars worth of property on the faith of a recognition of their construction of that contract, and *the Company* accepted that property knowing the understanding upon which Coburn & Ewing turned it over. So that upon this point it may be fairly said that Coburn & Ewing did not add new terms to the contract which had been made, nor supplement it by a construction contrary to their own intentions. The reasoning of the Court below may very justly be paraphrased to meet the view of the question here presented: "What Coburn & Ewing intended is clear and that the Com-

pany had knowledge of that intent is equally clear. Of course, if it proceeded with the settlement with notice of what Coburn & Ewing meant by the terms used, it accepted the contract upon that basis."

(*b*) More than two months after the matters referred to in the preceding paragraph had occured, Mr. Fisher, representing the Company, presented a form of a bond to Mr. Coburn for execution by him in accordance with the fourth subdivision of the compromise proposition of February 11th. In looking over the bond Mr. Coburn seems to have made an interlineation in pencil of the words "all pending litigation." This paper was one of very many which were prepared in closing up the compromise. As it is the only one produced or relied on by the Cattle Company, it is fair to assume that all the others excluded the idea which it is claimed that this interlineation conveyed. The explanation of Mr. Coburn's action is a very reasonable one: that he intended to refer to the suits pending by the Company, and that when he learned that the phrase might possibly be claimed to justify a construction that the claim of Coburn & Ewing was also included, the bond was refused to be signed, and that the bond actually given omitted any such language. The revision of this contract by Mr. Coburn was purely tentative. When the copy as revised was considered, the mere possibility that it might be used as an argument that the postion of Coburn & Ewing, which had been so strenuously and persistently urged for more than sixty days then past, had been abandoned, was sufficient to induce a refusal to further consider the instrument. More than that, when the refusal was communicated to the other side and a bond tendered which omitted the clause which is claimed to have been fraught with so much fatality, the Company again acquiesced in the position of Coburn & Ewing, and accepted a bond which recognized no such complete and far-reaching compromise. That the only paper which implies the slightest recognition of the position contended for was one which was refused to be executed, and that all the

papers which were in fact signed by the parties contained no such recognition, are potent circumstances in support of the position of Coburn & Ewing.

The facts referred to also have a bearing upon the question of good faith, on which the Court below laid such great stress. Notwithstanding that the attitude assumed by Coburn and Ewing and the painstaking care observed by them and their counsel in scrutinizing every document which was actually signed and delivered, were constant assertions by Coburn and Ewing that they did not propose to go beyond the terms of the contract as written, and a continual notice to the Cattle Company that they insisted upon the position assumed on the very day the contract was signed, the Cattle Company proceeded to accept the remainder of the property agreed to be delivered by Coburn and Ewing and never for an instant changed its position for the worse or parted with any value. It was reaping the benefits of the compromise all the while, knowing that Coburn and Ewing were delivering these to it only in reliance upon the correctness of the construction which they had placed upon the contract and announced to the Company. It was not until after the Company had received all the benefits, that it undertook the novel plan of obtaining an affirmative final decree on a motion, barring any future claim by Coburn and Ewing. Here again the reasoning of the Court below applies as well against the Cattle Company. "After this proposition had been made and accepted and before anything had been done except handing to counsel some certificates of stock, the Cattle Company was clearly informed of what Coburn and Ewing intended by their acceptance of its proposition. Much remained to be done. The cattle were to be valued, counted and delivered. It was an easy thing to hand back the certificates of stock. If the Company was unwilling to conclude the settlement when informed what Coburn and Ewing understood and intended by their acceptance of the proposition, it was its duty to say we have misunderstood the scope

of your acceptance. If you mean all that you now say, you do not understand us correctly. We have never come to any agreement. Instead of that, after full notice, the Company goes on and complies with all the terms of the proposition."

The result insisted upon by the Company is inequitable in its nature and ought not to be acceded to unless clearly shown to have been intended by both parties. The Company claimed the right to recover from Coburn and Ewing what they had received in the way of commissions from Munson. The ground of that claim was that Coburn and Ewing were the agents of the Company in the premises. There is no pretense that Coburn and Ewing have ever been compensated; nor that their claim to compensation has been considered or made a factor in the terms of compromise agreed upon. All that Coburn and Ewing claim is the right to have their demand for compensation passed upon by the courts of the land in a proper proceeding and according to settled rules of practice. They have received nothing on account of their claim, no concession has been made in consideration that they would forego the same, and the Company occupies the attitude of holding all of the benefits of the services rendered by Coburn and Ewing without having made any corresponding compensation.

Respectfully submitted,

HENRY N. ESS and
KARNES, HOLMES & KRAUTHOFF,
*Solicitors for Appellants.*

Kansas City, Mo., Sept. 1, 1890.

Office Supreme Court U. S.
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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1890.

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JAMES M. COBURN AND WILLIAM N. EWING,
*Appellants,*
*vs.*
THE CEDAR VALLEY LAND AND CATTLE COMPANY (LIMITED),
*Appellee.*

Cases Nos 139. 140. 141. 142

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# Statement and Brief of Appellee.

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**HARWOOD & MEREDITH,**
**MORGAN H. BEACH,**
*Solicitors for Appellee.*

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KANSAS CITY, MO.:
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JAMES M. COBURN AND WILLIAM N. EWING,
*Appellants,*
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THE CEDAR VALLEY LAND AND CATTLE COMPANY (LIMITED),
*Appellee.*

Case No 140. 139
141 and 142

As stated by counsel for appellants, there are on the docket of this court four cases, numbered 139, 140, 141 and 142 respectively, entitled as above, between the same parties and involving the same questions. The briefs of appellants, while numbered in each of said four cases, are in all identically the same, and we shall follow their example and treat the four cases as one.

To the statement of the cases as made by appellants we desire to make the following corrections and additions:

1. Case Number 139: The original bill of

the Cattle Company against Coburn & Ewing, in addition to the charge that Coburn & Ewing had fraudulently appropriated of the company's funds the sum of $40,000, alleged that Coburn & Ewing had, instead of purchasing the ranch and cattle at the lowest possible figure, agreed to pay Munson about $18,000 more for his bulls than he had at first been willing to sell for; and further, that Coburn & Ewing, out of the cash remitted to them by the company with which to pay Munson, had retained the sum of $60,000, and in lieu thereof had conveyed to Munson a lot and building in Kansas City belonging to them, and worth not more than $45,000.

The bill also alleged that on the day on which Ewing closed up in his own name the contract with Munson, he executed his declaration of trust to the company reciting that the contract was made in its behalf.

2. The following facts are either admitted by the pleadings of Coburn & Ewing or can be gathered from documentary evidence submitted by them prior to the hearing of the petition for a decree:

(1.) That Coburn and Ewing were acting as the company's agents in purchasing the ranch (the claim for compensation made on the company is based on this fact).

(2.) There was no express contract with the

company or its promoters for the payment of any compensation for these services beyond paying all expenses and the chance Ewing would have of being appointed manager; indeed, there was an express understanding that nothing more was to be paid. (See answer of Coburn & Ewing, case No. 139; letters of Burnett to Coburn & Ewing filed with their affidavit, case 141, pages 117, 121-2-3-4; and the prospectus referred to in Burnett's letter as enclosed, and which is filed as an exhibit with Coburn & Ewing's answer, case 141, p. 47.)

(3.) That without the consent or knowledge of the company, its promoters or directors (except of Burnett, who was to share with them), Coburn & Ewing bargained for and received from Munson a commission of $40,000.

3. Counsel for Coburn & Ewing appeared at the hearing of the petition for a decree, made no objection to the form in which the compromise agreement was presented to the court, did not object to the form in which the evidence was offered, but filed counter-affidavits and closed their petition for a rehearing with the following prayer: "We ask that the case be reheard, and (1) that this application for a decree be denied, and that the parties be left to the agreement which they have made, and that the bills be dismissed, (2) or that the entire evidence bearing on this settlement be heard."

4. We are not satisfied with the paraphrases made by appellants of some of the letters filed in support of the petition for a decree, but as we shall set out these letters in full in our argument, we shall not copy them here.

## BRIEF.

### I.

Appellants ask the reversal of the decrees entered by the court below for error of law, their contention being that, although they appeared at the hearing of the petition for decrees, made no objection to the form of the proceeding or to the reception as evidence of the affidavits offered by the Cattle Company, offered counter-affidavits in support of their view of the meaning of the compromise agreement, yet the court could not, even with the consent of the parties, consider the meaning of the agreement, but should of its own motion have compelled the Cattle Company to file formal supplemental bills and cross-bills.

Counsel for appellants seem to have treated the petition for a decree as if it were no pleading at all, and have cited many cases to show that a decree must be based on the allegations contained in the pleadings, and that unless pleaded a court will not notice releases, compromise agreements, etc.; but a petition for a decree is a pleading and was the proper one in these cases, and upon such a petition a compromise of pending litigation will be enforced by the court.

Daniell's Chan. Prac., (5th Am. Ed.) pp. 795-6, 1588.

*Dawson v. Newsome*, 2 Giff. 272.
Opinion of Vice-Chancellor in note to *Pryer v. Gribble*, 10 L. R. Ch. 534.

Indeed, it has been said that such a compromise would be enforced on oral motion.

*Tebbutt v. Potter*, 4 Hare, 164.

Where the Vice-Chancellor said that there did not appear to him any reason why the court should not enforce an agreement to dismiss a bill as well as any other arrangement made by the parties with reference to the suit.

Wherever a court of equity has declined on petition to enforce a compromise of pending litigation, the refusal has been based on the fact that a decree was asked adjudicating equities that were outside of the record, or to enforce an agreement that differed radically from any decree the court could have entered in the cause.

*Pryer v. Gribble*, 10 L. R. Ch. 534.
*Askew v. Millington*, 9 Hare, 65.
*Plumley v. Horrell*, 20 L. T. N. S. 473.

The proposition that a court has authority to give effect to any agreement of the parties relating solely to the conduct and prosecution of a cause before it, needs but to be stated to compel assent: such in effect was the agreement before the court in these cases, for both parties appeared at the hearing of the petition: both agreed that the bills

and cross-bills were to be no further prosecuted: both stood before the court admitting that they had made and were bound by the agreement as set out in the letters filed with the petition for a decree: both introduced affidavits to support their diverse views of the meaning to be attached to these letters: both asked the court to carry the compromise into effect by dismissing the bills and the cross-bills: neither raised any objection to the form of the pleading by which the agreement had been brought to the attention of the court: neither objected to the introduction of evidence in the form of affidavits; the Cattle Company asked, in effect, that the dismissals be with prejudice against the bringing of any further actions based on any of the matters in controversy, while Coburn & Ewing asked that as the compromise, on its face, did not embrace their claim for compensation, the dismissals should be without prejudice.

That the decrees in these cases, amounting as they do simply to dismissals with prejudice, were within the prayers for general relief is too clear to need argument. This court has gone much further, it has said that it was competent for a court to enter a decree on a compromise, although the compromise embraced a claim not litigated.

*Nashville, etc., R. R. v. U. S.*, 113 U. S. 261.
Wells' Res Adjudicata, 366.

A judgment entered by agreement will bind

those by whose agreement it has been entered, notwithstanding the fact that the pleading would not in a contested case have authorized such a judgment.

*Fletcher v. Holmes*, 25 Ind. 458.

In submitting the question of the meaning of the letters to the court, the parties in effect submitted an agreed statement of facts, and it needs no citation of authorities to sustain the proposition that decrees entered on such agreed statements of facts are binding as to all matters therein embraced.

*Derby v. Jaques*, 1 Cliff. (C. C.) 425.
*Porter v. Bussey*, 1 Mass. 436.

Counsel for Coburn & Ewing have discovered, since the court below failed to follow their view of the agreement, that for a court, even at the request of both parties, to interpret an agreement compromising pending litigation is "little less than monstrous," and that in determining the question of the conditions upon which actions pending should be dismissed, the circuit court has not only been guilty of as "gross and complete perversion of all axioms in the equity law of procedure as can be found in the books," but it has also violated the constitutional rights of these appellants in denying them trial by due process of law. We can not make better answer to such views, or to the view that a supple-

mental bill was necessary in introducing the compromise agreement, than to quote from the opinion of this court in *Kelsey v. Hobby*, 16 Pet. 269, 277, in which case the defendants, having obtained from plaintiff a release as to certain matters involved in pending litigation, filed the release with a motion to dismiss the bill, which motion was opposed by plaintiff on the ground that the release was obtained by duress. This court said: "Some objections have been made as to the manner in which the release was introduced into the proceedings. It was filed in the cause and a motion thereupon made to dismiss the bill, and it is said that being executed while the suit was pending, and after the answers in, and the accounts before the master, it should have been brought before the court by cross-bill or supplemental answer, and could not, in that stage of the proceedings, be noticed by the court in any other way. It is a sufficient answer to this objection to say that it was admitted in evidence without exception and both parties treated it as properly in the cause; and the complainant proceeded to take testimony to show that it was obtained from him by duress, and the defendants to show that it was freely and voluntarily given. It had the same effect that it would have had upon a cross-bill or supplemental answer, and the complainant had the same opportunity of impeaching it. And there is no propriety in requiring technical formal proceedings

when they tend to embarrass and delay the administration of justice, unless they are required by some fixed principle of equity law or practice which the court would not be at liberty to disregard."

To the same effect are the words of JESSEL, M. R., in *Gilbert v. Endean*, 9 L. R. Ch. 259, 269. In commenting upon the fact that the merits of the case had improperly been taken up on motion and the evidence heard on affidavits, he said: "I think a court of appeals cannot refuse to decide on the merits where the parties in the court below argued the case on the merits without objecting to the evidence. They must be taken to have assented to having their rights decided on the motion according to the usual rules governing interlocutory motions. If they wished them to be decided otherwise, they should have objected to the reception of the evidence. I think it is impossible for appellants to succeed upon that ground, not having taken that course in the court below."

Where parties by agreement dispense with the usual formalities in the progress of a cause and no injustice results from the mode adopted, the court should not on slight grounds set aside the proceeding.

*Walden v. Bodley*, 14 Pet. 156.

Objections raised after decree entered by consent come too late and cannot affect the cognizance of the court as to the parties or the subject matter.

*Livingston v. Woodworth*, 15 How. 546.

## II.

Admitting that the compromise agreement was properly before the court, for the purpose, at least, of determining the effect it should have on the pending suits, we shall now consider the question as to whether the finding of the court, that there had been, "by agreement of the parties, a full compromise and settlement of all the matters in controversy," was supported by the evidence adduced. A consideration *seriatim* of the letters that passed between the parties and that were made the basis of the petition for a decree will show, we think, beyond any doubt, that there never was a proposition made by either party that did not contemplate a settlement of all matters in controversy, including the claim of Coburn & Ewing for compensation for services rendered in purchasing the ranch. We have emphasized by putting in italics the parts of the correspondence to which we desire to call particular attention.

I. The first offer of compromise endorsed "Received November 12, 1885," came from the solicitors of Coburn & Ewing and was as follows:

"Karnes and Waters will recommend any one of the following compromises:

1. C. & E. to be paid back the money for their stock, say, $50,000.

C. & E. to pay back the sum of $40,000.

Ewing to resign the management.

The company to enter its appearance in a suit to be brought by C. & E. to determine the value of their services and commission in purchase of property, leaving out all transactions between C. & E. and W. B. M.

2. The company to allow C. & E. $25,000 as their commissions for the purchase of the ranch, C. & E. to pay balance of $40,000, company to pay back amount of stock, each party to pay costs made by themselves.

3. Arbitrate by three persons, one selected by each, they to choose a third, what their services shall be, and the company then to pay the amount set, C. & E. to pay $40,000 and company to pay amount of stock.

*Either proposition to be finality as to all the matters embraced in the bill filed by the company vs. C. & E.*"

The inaccuracy of looking at the whole controversy as "a claim of the company against Coburn & Ewing," strangely enough, first appears in this first proposition for a settlement made by Coburn & Ewing, for after making three distinct offers of settlement, each involving the claim of Coburn & Ewing for this compensation, they say, speaking of their offers as a whole, "either proposition to be finality as to all the matters embraced in the bill filed by the company *vs.* C. & E."; this bill filed by the company contained no reference to anything owing by the company to Coburn & Ewing; it merely called for an accounting for certain moneys that the company claimed Coburn & Ewing had fraudulently appropriated to their own

use; yet, for the purpose of showing plainly that they meant to settle all matters in controversy, counsel for Coburn & Ewing then deemed it sufficient to use the expression above quoted.

II. To this offer of Coburn & Ewing, counsel for the Cattle Company submitted a counter-proposition, which was as folloms:

"RESPONSE TO THE PROPOSITION OF WATERS & KARNES, ATTORNEYS FOR COBURN & EWING.

Adams & Field and Geo. W. McCrary will recommend to their client, the Cedar Valley Land & Cattle Company, a settlement with Coburn & Ewing as follows:

1. C. & E. to be allowed for their stock what they have paid on it.

2. C. & E. to pay back to the company the sum of $40,000.

3. Ewing to surrender the management.

4. *This settlement to be a full and final adjustment of all the controversies between the parties and of all claims of either party against the other.*

5. *No delay of legal proceedings in consequence of these negotiations, unless by an agreement the controversies are ended.*

This proposition involves the surrender of the company's claim for the profit on the sale of the Delaware-street property, to which we think it entitled, and which will, we suppose, amount to about the sum of $15,000, as well as other claims set forth in its bill.

And it involves also the allowance for the stock of C. & E. of about $10,000 more than its present value.

*These are therefore the most favorable terms we can recommend, and under no circumstances can we advise the payment of commissions to C. & E. or any waiver of the company's right to defend against any claim that they may make on this account."*

Practically the whole argument of counsel for Coburn & Ewing on the facts is based on the idea that this last paragraph was intended to exclude from all future consideration in reaching a settlement this claim of Coburn & Ewing's for compensation due them for purchasing the ranch; they are right: this was the intention of the Cattle Company; but it made the surrender of this claim of Coburn & Ewing the *condition precedent* to the consideration of any offer of settlement. That either party could imagine for a moment that the company would ever settle and leave this claim open for further litigation is clearly an afterthought; the refusal to consider this claim is what the parties at this time split on; it is absolutely the only difference between the counter-propositions. Counsel for the Cattle Company assented to the offer of Coburn & Ewing as made except in this one particular, and their refusal to consider any proposition that would involve the payment of this claim or leave it open for further litigation resulted in the breaking off at this time of the negotiations for a compromise. While affairs were in this shape, appellants got the first inti-

mation of how a court would probably regard their conduct in the opinion of Judge McCormick (Record 141, page 112). This seems to have convinced them that they could not maintain their ground, and their counsel therefore again opened negotiations for a compromise, being willing now to come in subject to the condition precedent laid down by counsel for the Cattle Company.

III. Mr. Karnes' letter re-opening the negotiations was as follows:

Kansas City, Mo., Dec. 28, 1885.

*Judge Geo. W. McCrary, Att'y at Law.*

My Dear Sir: *In the matter of the controversy between the Cedar Valley Land and Cattle Company and Mess. Coburn & Ewing*, it must have been observed that I have not seemed quite in accord with those associated with me. I have always felt inclined to some amicable adjustment, and regretted when I was directed to terminate rather summarily the negotiations to that end undertaken a few weeks ago. I have now taken the liberty of addressing you this note entirely upon my own responsibility, and *I am induced to do so by a statement made to me by Mr. Gage, a mutual friend of both parties, to the effect that he understood Mr. Fisher that the terms proposed by you in our former negotiations were still open for acceptance. If such be the case, I say frankly to you that in my judgment the terms then proposed contain substantially the correct basis of settlement*, and I would like again to move in the direction of *ending all this interminable litigation*. I do not wish to tres-

pass on your valuable time, and hence I have not called to present these views in person, but if this letter receives a favorable response I will see my clients and at some time when agreable to you will call at your office to canvass the matter more in detail. If it is thought best by you not to negotiate further, I would be glad that no mention be made of this letter.

With high regard, very truly,

J. V. C. KARNES.

IV. Judge McCrary's response to this on same day was as follows:

KANSAS CITY, Mo., December 28, 1885.

*J. V. C. Karnes, Esq., Kansas City.*

MY DEAR SIR: Yours of this date received. Mr. Fisher is out of town and will not return until the last of the week. I think, however, he is still disposed to settle, and if you can bring your clients *to agree to the terms proposed by us*, let me know, and as soon as he returns I will see him and advise you. Yours truly,

GEO. W. MCCRARY.

P. S.—I will not mention the matter to any one until I hear from you further. G. W. M.

V. Upon the same day Mr. Karnes submits to Judge McCrary an offer of settlement authorized by his clients, as follows:

KANSAS CITY, Mo., Dec. 28, 1885.

*Judge Geo. McCrary, City.*

MY DEAR SIR: Upon the receipt of your communication of to-day I at once sought an inter-

view with my clients. Maj. Ewing is out of the city, and I only saw Mr. Coburn, who thinks Maj. Ewing will agree to any arrangement that he may make. *He has much to say of the company's injustice to them in seeking to appropriate without compensation the result of their labor and skill in the purchase of this property.* He contends that Munson was taken at a time when for several reasons he was very anxious to sell, and that they drove an unusually good bargain with him. Of course, I have sought to *impress upon him that the case must be tried squarely upon the law.* I have brought myself to believe that there is not much probability of your recovering on account of the house and the bulls, but as to the commission of $40,000 I have said frankly that I believed the chances were against my clients. This amount represents the whole sum your company has lost, *while it has received the benefit of valuable services at no expense whatever. Any settlement made must involve an entire withdrawal of the interests of Coburn & Ewing.* They insist that their stock is worth a premium, while, on the other hand, Mr. Fisher claims that it has depreciated. I am aware that you have the impression that Burnett was not connected with this sale, but in this it is more than probable that you are in error, and Coburn & Ewing have in their possession the proportional part realized coming to Burnett, amounting to $16,800. All these phases of the case I have gone over with Mr. Coburn, and he has become willing to settle in a way approximately as follows:

(1.) That the stock of Coburn & Ewing be taken at $50,000.

(2.) That Coburn & Ewing pay back to the company the $40,000 received from Munson.

(3.) That the company, with American se-

curities, indemnify C. & E. against any claim of the representatives of Burnett as to the $16,000.

(4.) *That all suits be dismissed, each party paying his own costs, all claims for damages or compensation be waived, and full receipts passed.*

(5.) That the salary of Ewing up to the time of his discharge be paid to him, amounting to about one month's pay, and that there be paid a few small items of expenses, amounting in all to a very small sum. *As I understand, this is substantially your proposition to us.* In a conversation with you, I think you stated that you would favor the indemnity for the $16,800. I believe there is a controversy between Mr. Ewing and Mr. Fisher as to whether the company owes Ewing about a month's balance on salary. This, however, can be settled by the books. If I have not made my proposition clear I will be glad to state it more fully, and upon Mr. Fisher's return I much hope a satisfactory adjustment can be made. Yours truly,

J. V. C. KARNES.

We wish here to call particular attention to the statements made in brief for appellants (p. 37-8), to the effect that in this proposition the item of Coburn & Ewing's compensation was entirely excluded—counsel in their argument wishing this court to draw the inference that it was excluded but *not* surrendered, while the fact as shown by the record is too plain to need further argument, that this and all subsequent letters recognized that that claim was indeed "placed beyond the pale of negotiation," and we submit that appellants are not now entitled to resurrect it.

VI. Judge McCrary, on January 5th, 1886, replied to this offer as follows:

KANSAS CITY, MO., January 5, 1886.

*Col. J. V. C. Karnes, Kansas City, Mo.*

MY DEAR SIR: We were advised by the counsel of the Cedar Valley Land & Cattle Company in London that the company has no right either to purchase or provide for the cancellation of the stock now held by Coburn & Ewing. In view of this advice, Mr. Fisher *does not feel at liberty to conclude the settlement upon the basis of taking back the stock.* If we could agree upon any settlement which would leave the stock in the hands of Coburn & Ewing or which would not require the company to take it, Mr. Fisher would feel at liberty to act in the matter; but as I assume that this cannot be accomplished, I have advised Mr. Fisher, who leaves for London in a few days, *to lay the whole matter before the Board and give us instructions* which will, I hope, enable us to agree with you upon some disposition of the stock and upon *a final adjustment of the matters between the parties.*

Yours truly, GEO. W. MCCRARY.

VII. Mr. Karnes replied to this letter as follows:

KANSAS CITY, MO., January 8, 1886.

*Judge Geo. W. McCrary, Att'y at Law.*

DEAR SIR: Your note of the 5th inst. was duly received, stating that no further action could be taken *in the matter of settling the dispute between the C. V. L. & C. Co. and Mess. Coburn & Ewing* until Mr. Fisher had additional instructions from his company. I have delayed answering until I could confer with Mess. C. & E., which I have now

pone. They greatly regret the delay that will be necessarily occasioned, as they *hoped for a speedy termination of the controversy.* I have urged upon them that they allow me to continue my *efforts for an adjustment.* This they have done, with the understanding that I request you to ask Mr. Fisher to report by cable at the earliest possible moment *whether the proposition will be accepted.* This is a matter involving so large an amount and requiring the taking of testimony at so many and such remote points that I assume that we are agreed as to the importance of determining this negotiation one way or another as soon as the same can be reasonably done.

Awaiting your further advice, I am, very truly,

J. V. C. KARNES.

VIII. Judge McCrary's reply of January 11th, 1886, says as follows:

KANSAS CITY, Mo., January 11th, 1886.

*J. V. C. Karnes, Esq.*

DEAR SIR: I have arranged with Mr. Fisher to cable me instructions from London *as to compromise of the controversy between Coburn & Ewing and the C. V. L. & C. Company.* I will advise you promptly when instructions are received.

Very truly yours, GEO. W. MCCRARY.

IX. On January 26th, Messrs. Karnes & Ess submitted the following offer of compromise to Judge McCrary, containing terms slightly more favorable to the company than the one of December 28th:

KANSAS CITY, Mo., Jan'y 26, 1886.

*Judge Geo. McCrary, City.*

DEAR SIR: Mess. Coburn & Ewing have 2,000 shares in the C. V. L. & C. Co., £5 each, paid, amounting to about $48,800. *They will settle the controversy with the company—*

1. By returning the $40,000 commission and the company's taking their stock at the actual price paid by them, or,

2. They will turn over to the company 1,600 shares and retain 400.

3. In any event C. & E. are to be protected against any claim by Burnett's estate either by a release or indemnity.

4. Mess. C. & E. agree not to buy up or otherwise molest any of the ranch privileges now enjoyed by the company.

5. This settlement in no way to affect the arrangements heretofore made concerning the W. & L. cattle, but the same to be carried out by both parties in good faith as agreed upon, but not to enter into this arrangement in any way whatever. In other words, the W. & L. cattle are in no way taken into consideration in this settlement.

6. The balance of salary as compensation to be paid to Mr. Ewing. Very truly,

KARNES & ESS.

Had this been the first letter in the correspondence, there cannot be any doubt but that Coburn & Ewing thereby meant to offer a settlement of all matters in dispute; we are not, however, left to the ordinary interpretation of the word "controversy" to determine the subject matter of this letter, for counsel for appellants had used it before in this correspondence. It had been used in Mr. Karnes'

letter of January 8th, in saying that his clients had hoped "for a speedy termination of the controversy" on the terms offered in his letter of December 28th, and it is absurd to say that the letter of December 28th contemplated any further litigation as to this claim of Coburn & Ewing.

Indeed, such a final and complete adjustment of all dealings between the parties do Coburn & Ewing offer in this letter of January 26th that they actually deem it necessary to put in an express stipulation that the settlement shall not affect the arrangement heretofore made as to the W. L. cattle: the W. L. cattle being a herd belonging to Coburn & Ewing, running on the Cedar Valley Company's range under a contract made prior to the rupture, and neither these cattle nor this contract had been mentioned or referred to in any manner whatsoever in the pending litigation. Our remarks under V. *supra* apply with equal force to the attempt that counsel for appellants again make in their brief, to have this court infer that either party at this time imagined that Coburn & Ewing were holding out from the settlement offered their claim for compensation.

X. On February 2d, 1886, Judge McCrary, in submitting to Mr. Karnes a further offer made

by Fisher while in New York *en route* for London, wrote this letter:

KANSAS CITY, Mo., February 2, '86.

*Col. J. V. C. Karnes, Kansas City.*

MY DEAR SIR: I enclose herewith a letter just received from Mr. Fisher from New York, which explains itself. *Mr. F. carries with him to London the several propositions of settlement which have been under discussion.* Will you kindly advise me what response Coburn & Ewing have to make to the terms suggested in this letter? If possible I should like to be advised in time to write to Mr. Fisher to-morrow, as requested.

Please return Mr. Fisher's letter.

(Inclosure.)

Yours very truly, GEO. W. MCCRARY.

This shows that the London Board would have before it in considering these matters the various offers for a compromise that had passed between the parties, and was notice to Coburn & Ewing that any proposition that would come from the Board must, of course, be taken with the understanding that the Board had before it the offer of December 28th, in which Coburn & Ewing, in order to obtain a footing for a compromise, had expressly abandoned the proposition that they were entitled to seek any compensation for their services in purchasing the ranch.

XI. Mr. Karnes' reply, declining Fisher's offer, was as follows:

KANSAS CITY, Mo., Feb'y 2, 1886.

*Mess. Geo. W. McCrary, City.*

DEAR SIR: I am just in receipt of your letter of to-day, including a letter from Mr. Fisher, from N. Y., which I herewith return to you. You have heretofore seen fit to express your appreciation of *what I had done and was doing to get this controversy settled*, and hence I need not restate my endeavors in the matter. I am only sorry tosee Mr. Fisher taking the position indicated by his letter. I am now convinced that Mr. Gage was correct in his opinion that he, F., was unfavorable to any settlement. The terms proposed in his letter I have not submitted nor will I submit to my clients. I have been satisfied from the beginning and am still satisfied, and have so stated to Mess. C. & E., that they were liable in law for the return of the $40,000, but I do not believe they are liable any further. This they ought to repay. *On the other hand, this company has received the benefits of their labor without any expense.* There ought to be some recognition of the equities of the case. On such a basis I have tried to have an adjustment made; but if it is the determination of Mr. Fisher to drive these men to the wall, then there is no alternative left but to fight. I shall still hope, however, that through the co-operation of yourself and Mr. Gage *that a fair and just settlement may be made*, and that the damage to the interests of all concerned, to which Mr. Fisher's rashness will lead, may be avoided. As Mr. Fisher mentioned my name in his letter, I would be glad to have him furnished a copy of this. Very truly,

J. V. C. KARNES.

XII. Thus matters stood when the cablegram was received from London, announcing that Ewing's proposals were declined and that a letter had been posted conveying the only terms that would be accepted.

XIII. On February 24th the following letter was written by Judge McCrary to Mr. Karnes:

KANSAS CITY, MO., February 24, 1886.

*Col. J. V. C. Karnes.*

MY DEAR SIR: I enclose a copy of letter, just received from the secretary of the Cedar Valley Land & Cattle Company, *submitting the only terms upon which the company will settle with Coburn & Ewing.* The sum demanded is nominally larger than that offered by you, but, as it is proposed to receive payment in cattle and the stock of the company now held by C. & E. at par, I am in hopes your clients will consider it better to accept than to continue the litigation.

If this proposition is accepted please advise me before March 4th. Yours truly,

GEO. W. MCCRARY.

The letter from the secretary enclosed with the preceding was as follows:

"THE CEDAR VALLEY LAND & CATTLE COMPANY, LIMITED, MORGATE STREET CHAMBERS, LONDON, E.C., Feb. 11, 1886.

DEAR SIR: *The board have had under their very careful consideration Mess. Karnes & Ess' letter, dated the 26th of January, 1886, containing two alternative offers by Mess. Coburn & Ewing*

*for the settlement of the claims made by the Cedar Valley Land & Cattle Company upon them.*

I am instructed to inform you that neither of these propositions is acceptable, and that *the action* against Mess. Coburn & Ewing must proceed. With that view the answer to Mess. Coburn & Ewing's cross-bill has been forwarded to Mess. Adams and Field along with a letter from the solicitors to the company.

The company being liable in a large sum of costs, which will not be recovered from Mess. Coburn & Ewing, *the only terms upon which the Board can agree to compromise the claim of the company* are as follows:

1. That the amount payable to the company by Mess. Coburn & Ewing be £10,000, the amount paid by them for the 2,000 shares now standing in their names.

2. That this amount, £4,000, shall be paid in cash, or in lieu thereof that the cattle of the L. & W. herd now upon the Cedar Valley ranch shall be accepted as cash, when counted over this spring, upon a valuation to be made by two valuers—one chosen by Coburn & Ewing and one by the company—the valuers appointing a referee.

3. That the balance then remaining due to the company will be discharged by the transfer to such person or persons as may be named by the Board of a sufficient number of Mess. Coburn & Ewing's shares on the basis of a par value, the shares then remaining in the hands of Coburn & Ewing to be held by them for a period of not less than two years.

4. Mess. Coburn & Ewing to give security that they will not buy up or otherwise molest any of the range privileges now enjoyed by the company.

5. The company agree to protect Coburn &

Ewing against any claim from the executors or the partner of the late Geo. Burnett.

When the Board consider (1) *that the issue has practically been decided against Mess. Coburn & Ewing by the same judge before whom the case will ultimately be tried;* (2) *that Mess. Coburn & Ewing have received from Mr. Munson the sum of $75,000 for a property which, in the written estimate of six of the eminent valuers in Kansas City, is worth from $45,000 to $50,000;* (3) the almost insuperable difficulty which the Board will have in placing any of the shares transferred by Mess. Coburn & Ewing in consequence of the non-payment, a dividend resulting from Mr. Ewing's vindicative or il-judged action in ordering the beeves back to the ranch, and (4) the interest upon the amount of commission obtained in various ways from Mr. Munson from the period of its receipt up to the present date, which, we are advised, would be recoverable from them by an action at law, the Board is of the opinion that the foregoing offer is more favorable to Mess. Coburn & Ewing than the latter have any right to expect. The Board, however, is induced to offer these easier terms with the object *of settling the matter* before the general meeting of the 4th of March. It is therefore to be distinctly understood that this proposal only remains open until the 3rd of March, and that failing the receipt on or before that date of a telegram announcing that Mess. Coburn & Ewing have signed an agreement embodying the above terms, the offer now made by the Board is withdrawn on that day. It will suit the company infinitely better to receive the amount of their claim in cash, as would be the case when a judgment has been recovered in their favor, than to have to deal with any large number of shares transferred by Mess. Coburn & Ewing. It is to be understood that the offer is to be made with-

out prejudice to any claim for damages which the Board may have against the executors or the partner of the late George Burnett.

The directors desire me to add that in the event of the foregoing offer being refused they will feel it their duty in the interests of the shareholders to claim full compensation for damages which the company have sustained under various heads, which are clearly attributable to the account of Mess. Coburn & Ewing.

I am, dear sir, yours truly,

JAMES E. WEBB, *Sec'y.*

*Geo. W. McCrary, Kansas City, Mo., U. S. A.*"

Appellants' case, as far as the facts are concerned, rests upon the meaning to be attached to the words, "the only terms upon which the Board can agree to compromise the claim of the company are as follows"; appellants insisting that as their offers of December 28th and January 26th had made no mention of the claim for compensation, and as both parties had made and received propositions for a settlement in which it was understood that this claim was left open for further litigation, they were entitled to take Mr. Webb at his word and to accept this proposition without concluding themselves from further prosecuting their claim for compensation for purchasing the ranch.

We think that we have demonstrated that this argument, so far as concerns the letters of December 28th and January 26th, has no foundation in the facts as presented by appellants in the records of

these cases, and further consideration will show that not only did Coburn & Ewing have no reason to think that the company intended to settle part only of the litigation, but that in point of fact they were well aware of what was meant by this offer.

(1.) The negotiations had been broken off in November for the sole reason that Coburn & Ewing insisted on this claim, and counsel for the Cattle Company then told them that no proposition would be received or made that did not contemplate a complete surrender of this position.

(2.) The proposition made by Coburn & Ewing on December 28th was a renewal by them of the negotiations for a settlement and contained an express and complete surrender of this claim. The only use they make of it is to gain credit for abandoning it.

(3.) The proposition of January 26th was only a slight alteration of that of December 28th, and made no change in the basis of settlement.

(4.) Judge McCrary's letter transmitting the offer of the company showed plainly what meaning he attached to Mr. Webb's words, and appellants are as much bound by Judge McCrary's letter as by that of Mr. Webb; had his letter contained stipulations as to payment of costs, etc., would they not have been held to have assented thereto in accepting the offer "as made"?

(5.) Appellants had been informed that Mr.

Fisher carried with him to London to lay before his Board the several offers of compromise; they knew that in making any counter-proposition the Board would be aware of the fact that appellants had consented in their letter of December 28th to treat this claim as abandoned; it was well understood by all parties that the only issues left were, (1) the amount owing by Coburn & Ewing, (2) how this amount should be paid.

(6.) Mr. Webb was not a lawyer; he had heard submitted to his Board the several propositions of Coburn & Ewing, in each of which they were offering to pay to the company the $40,000 received as a commission from Munson; he knew that his company also claimed that Coburn & Ewing should pay to it the profit they had realized on the sale of their Kansas City property to Munson and the amount that they had over-paid Munson on the bulls, the company's claim with interest amounting to a total of about $75,000; the proposition, as finally passed by the Board, was to ask Coburn & Ewing to pay $50,000 instead of the $40,000 offered by them, and to receive payment of this in cattle and in stock at par, though as claimed by the company the stock was not worth its par value by several thousand dollars. In transmitting this offer to Judge McCrary, Mr. Webb plainly shows, by the opening paragraph of his letter that his subject matter is identical with that of the letter of

January 26th, written by Karnes & Ess; this was a reply thereto, and it is not surprising that under the circumstances, perhaps without any definite knowledge of the shape the litigation had taken, Mr. Webb should have spoken of Karnes & Ess' letter of January 26th as "containing two alternative offers by Mess. Coburn & Ewing for the settlement of the claims made by the Cedar Valley Land and Cattle Company upon them," and that he should say, "the only terms upon which the Board can agree to compromise the claim of the company are as follows." Is it not preposterous to suppose that appellants for a moment thought that Mr. Webb was now attempting to open a new basis for a settlement (new, however, only in leaving open for further litigation a claim that appellants had announced their willingness to surrender)?

(7.) The claim in appellants' brief that the company was demanding the "pound of flesh," but was making no concessions, is not supported by the facts. The fifth paragraph of Mr. Webb's letter shows that for the purpose of ending all litigation the company was surrendering on its side claims that they had a most reasonable prospect of being able to maintain, and that would foot up more than $25,000.

(8.) That appellants and their counsel well knew that this offer was intended to embrace all matters in controversy, and that they realized

how cautiously their reply would have to be worded, if they desired to attempt to avail themselves of Mr. Webb's *lapsus penna*, is clearly shown by their actions at this time. That the question as to what Mr. Webb's letter meant was canvassed by them is apparent from Mr. Karnes' affidavit.

If there had really existed any doubts in their minds about it, nothing would have been easier than by telephone or letter to ask Judge McCrary what interpretation the Cattle Company put upon the phrase, "claim of the company."

But no; they knew too well what his reply would be. His own letter transmitting the other showed that it did not occur to him that there was any room for doubt.

The course adopted by Coburn & Ewing to bolster up their scheme to outwit the enemy in this compromise, as revealed by the affidavit of Mr. Karnes, is well worthy of consideration as bearing upon their good faith in this matter. They assembled their counsel together, and all to themselves; "it was then understood and agreed," says Mr. Karnes in his affidavit, "that the propositions hitherto made had been rejected, and that the company offered these terms in these letters of February 11th and 12th as the ultimatum; and while it was desired in many respects to modify these harsh terms, it was agreed that

to avoid any misunderstanding that the two letters be copied into a letter of acceptance, and that the terms be unconditionally accepted, and this was done; and affiant says that it was then distinctly stated by Coburn & Ewing that these terms would be accepted only in the way they were proposed, and to cover nothing more. Affiant says that he and his associate counsel, Jos. G. Waters, prepared the letter of acceptance with that understanding."

Appellants and their counsel well knew that in order to treat with the company at all, they had been forced to make an express disavowal of this claim, and that Mr. Fisher had carried with him and laid before the Board this disavowal. What right had they, then, to "understand and agree" that the company's offer was not based upon this express abandonment of this claim?

But after having "in their own minds" placed this strained construction on the company's offer, we may well imagine that they found it difficult to frame a reply that would not either cure Mr. Webb's slip or draw attention to the fact they were trying to take advantage of it; this difficulty, however, was overcome by the plan adopted, of copying bodily these two long letters from Mr. Webb and simply adding an acceptance; this was done, more pages being written than lines had been necessary had they not been bent on trying to take this un-

fair advantage. Note, too, the bitter irony contained in the last clause of the letter of acceptance, in saying to Judge McCrary, "We desire to express to you our thanks for the uniform courtesy with which you have treated us throughout this unpleasant matter." A strange return they were making for his courtesy in thus attempting to obtain an advantage of his client in a way that, if it succeeded, could not but bring discredit upon him for his failure to guard well every loophole, in treating with such adversaries.

(9.) Immediately after Coburn & Ewing's letter of acceptance was received (see affidavits of Mr. Field, Mr. Karnes and Judge McCrary in Record 141, pages 157, 153 and 156), Mr. Field, junior counsel for the Cattle Company, prepared a paper releasing the sureties on the $75,000 injunction bond that had been given by the company. This paper also contained stipulations as to the dismissal of the bills and cross-bills, and was presented to Mr. Karnes to sign; he refused to do so, and made certain statements to Mr. Field as to Coburn & Ewing standing squarely on their agreement as made; and this, counsel for appellants contend was sufficient notice to the Cattle Company of the intention of Coburn & Ewing to claim that the compromise did not bar their claim against the company. We submit that a careful consideration of the affidavits of Mr. Karnes and of Mr. Field in

regard to this matter will show that Mr. Karnes did not make clear to Mr. Field that his refusal to sign was based on this claim of his clients; but however this may be, as soon as Judge McCrary heard an intimation that it was claimed the settlement did not cover all matters in litigation, he at once wrote the letter of February 27th, 1886, as follows:

XV. KANSAS CITY, MO., February 27, 1886.

*Mess. Coburn & Ewing, Kansas City.*

GENTLEMEN: Mr. Karnes has handed me your letter accepting the terms of compromise proposed by the Cedar Valley Land & Cattle Company, and has also placed in my hands the certificates for the two thousand shares of stock held by you in the company. I will wire Mr. Webb, secretary of the company, that you have accepted in writing the company's proposition, and have written him requesting that the company take immediate steps to choose a valuer and proceed with as little delay as possible to close up the matter of the compromise. *Of course, it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties.* The matter of costs and the balance due you on salary can easily be adjusted hereafter. Col. Karnes and I agree that each party pays its own costs.

Yours' truly,

GEO. W. MCCRARY.

From this letter, it appeared that Judge McCrary had not yet notified his principals of the acceptance of their offer. There was time enough for Coburn & Ewing to withdraw their acceptance

if there was a misunderstanding; yet they made no reply to this letter, but silently acquiesced in Judge McCrary's interpretation of the agreement and complied with the terms thereof.

As to the argument of the appellants, that Mr. Karnes' reply to Mr. Field was a sufficient notice to the company of how Coburn & Ewing regarded the compromise agreement, we say the company's proposition had been submitted in writing by Judge McCrary, he was the properly accredited agent of the company in making this compromise, all the negotiations had been had with him, and when out of an abundance of caution he wrote that letter of February 27th to Coburn & Ewing, the parties who had in person signed the agreement, it was their duty, if they really expected to insist on a different interpretation, to give notice to him, nor had they any right to rely upon the statement of Mr. Karnes that he had told Mr. Field that receipts in full were not to be passed. (See Coburn's affidavit, Record 141, page 159.)

Judge McCrary's letter showed that he regarded Mr. Karnes' vague hints as mere *brutum fulmen*, and that before notifying his clients of the acceptance of their offer he desired to make clear to Coburn & Ewing the meaning to be attached to the agreement.

On receipt of a cablegram that Coburn & Ewing had accepted the company's offer, Mr. Webb

addressed a letter to Judge McCrary, a copy of which was transmitted to counsel for Coburn & Ewing on March 18th. These letters were as follows:

XVI. KANSAS CITY, Mo., March 18, 1886.

*Messrs. Karnes & Ess, Kansas City, Mo.*

GENTLEMEN: I am just in receipt of a letter from James E. Webb, secretary of the Cedar Valley Land & Cattle Company, Limited, of date March 6th, of which I enclose you a copy. Mr. Webb sends me with this letter an assignment, to be executed by Messrs. Coburn & Ewing, transferring to him 1,200 shares of their stock in said company. When Mr. Webb wrote this letter he he had not received my communication, written on the 27th day of February, informing him that Messrs. Coburn & Ewing had placed in my hands their certificates for the whole 2,000 shares, and had requested that the company would issue to them a new certificate for 800 shares. That letter would reach London about the 7th inst., and an answer may be expected very soon. Probably it would be better to take no further action until it is received. Yours very truly,

GEO. W. MCCRARY.

The Cedar Valley Land & Cattle Company, Limited, Morgate Street Chambers (30*a* Morgate street).

LONDON, E. C., 6 March, 1886.

DEAR SIR: I have to acknowledge the receipt, on the 27th February, of your cablegram of that date, reading:

"Terms proposed accepted by Coburn & Ewing to-day in writing."

That telegram was laid before the Board at

their meeting on the 3rd inst., and I am directed to inform you that they are glad that a settlement has been arrived at upon terms which they believe will be found upon consideration to be satisfactory to all parties. *The Board is prepared to find that all the obligations entered into by Mess. Coburn & Ewing will be faithfully and honorably carried out by these gentlemen, and they trust that amicable relations will be resumed and will continue uninterruptedly for the future.*

With the view to carry out the provisions of the agreement with Mess. Coburn & Ewing, I now enclose a transfer of 1,200 shares, to be executed in my favor, and the company undertake that if the value of the L. W. herd shall exceed the sum of £4,000 the difference shall be adjusted by the transfer to Mess. Coburn & Ewing of shares to an equivalent value.

Awaiting confirmation by letter of your cablegram of the 27th. Yours truly,

THOMAS E. WEBB, *Sec'y.*

*Geo. W. McCrary, Esq., K. C., Mo., U. S. A.*

From this letter written by Mr. Webb, Coburn & Ewing again had ample notice of the company's view of the compromise. No one can read it without being convinced that the writer thought that the entire controversy was settled.

We have perhaps carried to unnecessary length this argument on the correspondence filed with the petition for the decrees, but we think that we have established beyond any reasonable doubt:

(1.) That the intention of the Cattle Company was to offer a compromise settling all matters in controversy; and

(2.) That Coburn & Ewing were well aware of the company's intention when they accepted its offer.

If these facts be true, then it needs no further argument to reach the conclusion that Coburn & Ewing are bound by this offer as made, and that they are estopped by their acceptance of the offer from insisting on any such literal and unfair interpretation of the words used as they pretend to have placed on them.

## III.

Another phase of these cases to which we wish to draw the court's attention is this:

If upon the whole record it appears that no injustice has been done appellants, if upon their case as presented by themselves the court be satisfied that appellants could not in any event recover on their claim for compensation, then this court will not reverse the cases and entail upon the parties useless and expensive litigation.

That appellants cannot recover the compensation claimed, we think is manifest. To recover at all, they must admit that they were acting as the company's agents in purchasing the ranch; their own pleadings and their offer to return to the company the $40,000 show that while acting as the company's agents to buy, they bargained for and received a large commission from the seller. In the language of the court below in passing upon the applications for a preliminary injunction (Record 140, page 20), "It is elemental, familiar and just that a broker negotiating a sale cannot without the knowledge of his principal be agent for one party to buy and take commissions from the vendor. The letters of Coburn & Ewing, ignoring all other evidence, show that they were agents of the company to buy, and they admit that they took commissions from the vendor. When the company,

the principal, ascertained this fact, it had a right to remove such an agent from the post of manager. The affidavits last filed, instead of helping Coburn & Ewing, make clearer the wrong. Burnett's letters, in places I have marked, show that C. & E. were notified of ignorance of promoters, and also the compensation as represented to them of Mr. E.'s services."

We respectfully submit that the appeals are without merit.

HARWOOD & MEREDITH,
MORGAN H. BEACH,
*Solicitors for Appellee.*

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1890.

No. 128.

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CHARLES E. WHITEHEAD, TRUSTEE, &c., APPELLANT,

*vs.*

E. E. SHATTUCK ET AL.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

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(27 Fed. Rep., 778.)

WHITEHEAD, *Trustee*,
*v.*
ENTWHISTLE.

(Circuit Court, N. D. Iowa, C. D. June Term, 1886.)

1. Equity—Jurisdiction—Remedy at Law.—To sustain the jurisdiction in equity, it must be shown that there is no sufficient and speedy remedy at law.
2. Courts—United States Courts—State Statute creating New Right—Jurisdiction.—Where a State statute creates a new right, and provides a remedy for the enforcement thereof, the United States courts will, for the protection of the right created, follow the remedy prescribed; but this is subject to the limitation that the remedy is not contrary to some provision of the Constitution of the United States or acts of Congress.
3. Same—New Equitable Remedy—Adequate Legal Remedy—Right of Trial by Jury.—In the United States courts, if the remedy at law is speedy and adequate, a remedy in equity, created by State statute, cannot be resorted to, because of the provisions of section 723 of the Revised Statutes, and of article 7 of the amendments to the Constitution of the United States, guarantying the right of trial by jury.

Equity. Demurrer to bill.

JOHN F. DUNCOMBE, *For Complainant.*
C. A. CLARK, *For Defendant.*

SHIRAS, *J.:*

By the bill filed in this cause the complainant seeks to quiet the title to certain real estate situated in Humboldt county, Iowa, averring that he is the owner in fee simple thereof, holding the legal

title as trustee for the Des Moines & Fort Dodge Railroad Company; and further alleging that the defendant is in actual possession of the premises in question, claiming title thereto under a homestead entry made in the year 1867, and under a purchase from the Iowa Homestead Company, which latter company claims under the act of Congress passed in 1855, granting lands to the State of Iowa in aid of the construction of certain lines of railway in said State. The bill charges that the claim and pretended title of defendant is without foundation in law or equity; that the certificate of entry under the homestead act and the conveyance from the Iowa Homestead Company are fraudulent and void, procured without legal right and in violation of law; but that the same are clouds upon complainant's title. Wherefore complainant prays that the certificate of entry under the homestead act and the conveyance to defendant from the Iowa Homestead Company be annulled and canceled, and the cloud upon complainant's title be removed, and that the title be quieted in complainant.

To this bill defendant demurs, upon the ground that this court as a court of equity has not jurisdiction, in that it appears that complainant has a plain, speedy, and adequate remedy at law.

From the averments of the bill it appears that complainant is not seeking equitable aid to perfect his own title or the evidences thereof. He avers that as trustee he holds the legal title to the land, and exhibits the chain of conveyance upon which he relies. The relief asked in the bill is wholly aimed at the clouds caused by the evidences of title under which defendant claims, and as to these it is averred that they have no foundation in law or equity. It is also averred that defendant is in actual possession of the land, holding the same openly and adversely to the claim of complainant.

Section 723 of the Revised Statutes provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." As is said by the supreme court in Lewis *v.* Cocks, 23 Wall., 466, this provision of the statute is only declaratory of a principle which is as old as the earliest period of the recorded history of English equity jurisprudence. By express declaration of the Constitution of the United States it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." If, then, a plain and adequate remedy exists at law a defendant cannot be called upon to submit his rights to the decision of a court of equity, because he has a constitutional right to a trial by jury. *Hipp v. Babin*, 19 How., 271; *Lewis v. Cocks*, 23 Wall., 466; *Killian v. Ebbinghaus*, 110 U. S., 568, S. C. 4 Sup. Ct. Rep., 232; *Fussell v. Gregg*, 113 U. S., 550, S. C. 5 Sup. Ct. Rep., 631.

To sustain the jurisdiction in equity, it must be shown that there is no sufficient and speedy remedy at law. The bill in this cause not only fails in this particular, but, on the contrary, affirmatively shows that a plain and proper remedy can be had at law. It is averred that complainant holds the legal title to the lands, and that the defendant is in possession thereof, denying complainant's right.

The bill, by its averments, shows clearly that complainant and defendant claim title from different sources, and through different chains of conveyances, and the real question to be determined is, Which is the better legal title? The defendant being in possession, an action at law in the nature of ejectment affords a plain and speedy mode of settling the question of title, and that fact is fatal to the jurisdiction in equity.

On part of complainant it is urged, however, that the statute of Iowa confers the right to bring a bill to quiet title in cases of this character and that thereby the jurisdiction of this court in equity has been enlarged. Section 3273 of the Code of Iowa enacts that "an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession." As construed by the supreme court of Iowa, it cannot be questioned that this section enlarges the powers of a court of equity, and that, in the State court, a bill in equity may be entertained in favor of a party in possession against one not in possession, and in favor of one not in possession against one in possession. *Lewis v. Soule*, 52 Iowa, 11, S. C. 2 N. W. Rep., 400; *Lees v. Wetmore*, 58 Iowa, 170, S. C. 12 N. W. Rep., 238.

On the part of complainant it is argued that under the rule announced in *Clark v. Smith*. 13 Pet., 196; *In re Broderick's* Will, 21 Wall., 503, and *Reynolds v. National Bank*, 112 U. S., 405, S. C. 5 Sup. Ct. Rep., 213, to the effect that "the State legislatures certainly have no authority to prescribe the forms and proceedings in the courts of the United States, but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as in the State court. On the contrary, propriety and convenience suggest that the practice should not materially differ where titles to lands are the subjects of investigation." The section of the code of Iowa above cited creates a new right, enforceable in equity, and therefore this court has the right to entertain the present bill.

There can be no doubt, under the repeated decisions of the United States Supreme Court, that where a State statute creates a new right, and provides a remedy for the enforcement thereof, the United States courts will, for the protection of the right created, follow the remedy prescribed; but this is subject to the limitation that the remedy is not contrary to some provision of the Constitution of the United States or of the acts of Congress. Under the code of Iowa a party not in possession of realty may bring an action against another, also out of possession. This is a statutory enlargement of rights, and as no action at law will lie in such case this court, as a court of equity, would have jurisdiction thereof. If, under the code of Iowa, a party having the legal title to realty, and being out of possession, may bring, as against a party in possession, either a suit in equity to quiet title and for possession or an action at law, then, suing in the State courts, he has a choice of remedies. In the United States

courts, if the remedy at law is speedy and adequate, he cannot avail himself of the remedy in equity created by the State statute, because of the provisions of section 723 of the Revised Statutes, and of article 7 of the amendments to the Constitution, guaranteying the right of trial by jury.

Counsel for complainant quote largely from the opinion of the Supreme Court in *Holland v. Challen*, 110 U. S., 15, S. C. 3 Sup. Ct. Rep., 495, a case arising in Nebraska, under the provisions of a State law identical in meaning with that of Iowa, and in which case the jurisdiction in equity was sustained. In the circuit court the bill was dismissed on demurrer, which ruling was reversed by the Supreme Court. The bill did not aver that complainant was in possession, but did aver that the defendant was slandering complainant's title by claiming to be the owner of the real estate, and by trying to obtain, take, and keep possession thereof. In the opinion of the court the benefits of the State statute are pointed out, and it is clearly demonstrated that no fact appeared upon the face of the bill which defeated the right of the court to entertain jurisdiction in equity. It is made plain, however, that this ruling was based upon the assumption that the defendant was not in possession, and that therefore an action at law could not be sustained. Thus, we find it said:

"No adequate relief to the owners of real property against the adverse claims of persons *not in possession* can be given by a court of law. If the holders of such claims do not seek to enforce them the party in possession or entitled to possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity. It does not follow that by allowing, in the Federal courts, a suit for relief, under the statutes of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no controversy at law respecting the title to or right of possession of real property, when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the Federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, *nor is it of such cases we are speaking.* * * * If the controversy be one in which a court of equity *only* can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

In *Reynolds v. National Bank*, 112 U. S., 405, S. C. 5 Sup. Ct. Rep., 213, it is held that the legislation of the State may be looked to to ascertain what constitutes a cloud upon a title, and that what is declared to be a cloud by State statute will be removed by a court of the United States sitting in equity, even though, in the absence of the statute, the defect was not such as courts of equity had recognized as casting a cloud upon the title. The facts of the case did not present the question of a speedy and adequate legal remedy.

*Killian v. Ebbinghaus*, 110 U. S., 568, S. C. 4 Sup. Ct. Rep., 232, and *Fussell v. Gregg*, 113 U. S., 550, S. C. 5 Sup. Ct. Rep., 631, reit-

erate the rule to be "that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

If, then, it be true that the State statute can, by enlarging equitable rights and remedies, confer upon the United States courts equitable jurisdiction in a case wherein there exists a plain and adequate remedy at law, it follows that indirectly, but effectually, State legislation has abrogated section 723 of the Revised Statutes, which expressly forbids the United States courts from taking jurisdiction in equity in cases wherein the remedy at law is adequate, and has annulled the constitutional provision securing the right of trial by jury.

As we construe the allegations of the bill filed in the present cause, it clearly appears therefrom that complainant has a speedy and adequate remedy at law to settle the question of title and right of possession of the realty in dispute between the parties hereto; and, that being so, it follows that this court cannot, sitting as a court of equity, entertain jurisdiction of the cause, and the demurrer to the bill must therefore be sustained.

BREWER, *J.*, concurs.